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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 73

NEW YORK CENTRAL RAILROAD COMPANY,
PETITIONER,

vs.

ANTONIA AMBROSE, AS ADMINISTRATRIX OF THE ESTATE OF JOHN AMBROSE, DECEASED

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HUDSON COUNTY, STATE OF NEW JERSEY

PETITION FOR CERTIORARI FILED APRIL 29, 1929

CERTIORARI GRANTED MAY 27, 1929

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IN CIRCUIT COURT OF HUDSON COUNTY

Action at Law

ANTONIA AMBROSE, Administratrix of the Estate of John Ambrose, Sr., Deceased, Plaintiff,

v.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, Defendant

COMPLAINT—Filed August 9, 1927

Plaintiff residing at No. 112 13th Street, West New York, in the County of Hudson and State of New Jersey, says that:

1. She is administratrix of the Estate of John Ambrose, Sr., deceased, and brings into court letters of administration granted to her upon the said estate by the Surrogate of the County of Hudson.

2. Defendant is now and was at all times hereinafter mentioned, a corporation of the State of New York, engaged in interstate commerce as a common carrier by railroad, at Weehawken, in the County of Hudson.

3. Intestate of the plaintiff, on the 16th day of July, 1927, was employed by the defendant in said interstate commerce.

[fol. 2] 4. Intestate of the plaintiff, on the 16th day of July, 1927, at Weehawken aforesaid, was killed through the negligence of the defendant.

5. The negligence of the defendant consisted in this: While intestate of the plaintiff was in the grain elevator of the defendant company on Pier 7 at Weehawken, engaged in the interstate commerce of the defendant, the defendant failed to use reasonable care to provide the intestate of the plaintiff with a safe place in which to work, but on the contrary, negligently and carelessly, and without warning or notice to the intestate of the plaintiff, used certain poison-

ous gases or chemicals in the said grain elevator where intestate of plaintiff was at work, and by reason thereof he was overcome by said poisonous gases and chemicals and was caused to fall into a shaft and was killed.

6. The intestate of plaintiff was at all times in the exercise of due care for his safety.

7. Intestate of plaintiff left him surviving, his widow, the plaintiff herein, age 57 years, a son, Joseph Ambrose, age 34; a son, John Ambrose, Jr., age 25 years; a daughter, Minnie Sherman, age 21 years and a son, William Ambrose, age 18 years, who have suffered pecuniary injury by reason of his death.

8. The within action is commenced within twenty-four calendar months after date of death of plaintiff's intestate.

Plaintiff demands $25,000.

Alex. Simpson, Attorney for Plaintiff.

[fol. 3] In Circuit Court of Hudson County

[Title omitted]

Answer—Filed August 27, 1927

The defendant, New York Central Railroad Company, a body corporate of the State of New York having its principle place of business in the City of New York, answering complaint herein says that:

1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.

2. It admits paragraph 2.

3. It denies paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5, and says that it is not guilty of any of the negligence set out in the complaint.

6. It denies paragraph 6.

7. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 7.

[fol. 4] Second Defense

Any injuries sustained by plaintiff's intestate, were occasioned by his negligent conduct in going to the place where said injuries were received in violation of defendant's orders, and when to the knowledge of plaintiff's intestate it was obviously dangerous so to do.

Wall, Haight, Carey & Hartpence, Defendant's Attorneys.

In Circuit Court of Hudson County

Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., Deceased,

v.

New York Central Railroad Company

Before Hon. Frank L. Cleary, J., and a Jury

Case

Jersey City, N. J., May 10, 1928.

Appearances of Counsel

Alexander Simpson, Esq., for the Plaintiff.
Wall, Haight, Carey & Hartpence, Esqrs., for the Defendant, by William H. Carey, Esq.

A jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the jury.

Mr. Simpson: I offer the Letters of Administration [fol. 5] granted on July 21st, 1927, on the estate of John Ambrose, deceased, to Antonia Ambrose by the Surrogate of the County of Hudson.

Mr. Carey: General administration.

Mr. Simpson: General administration.

(Accepted and marked as Plaintiff's Exhibit P-1 of this date.)

WILLIAM JOSEPH DILLWORTH sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Where do you live?
A. West New York.
Q. What is your employment?
A. Foreman of the bin floor, West Shore grain elevator.
Q. Were you employed in the grain elevator located at Weehawken under the control and operation of the New York Central Railroad?
A. Yes, sir.
Q. How long have you been so employed?
A. About eight years.
Q. What is your position there?
A. Foreman.
Q. What is the work that is done in that elevator?
A. Just on the floor where I work?
Q. In the elevator, the building, what is it used for; what do you do with it?
A. Handling of grain.
Q. Grain that comes in railroad cars and goes out?
A. Yes, sir.
Q. Who is in general charge of the grain elevator, or was?
A. Mr. Shanahan.
Q. What is his position?
A. Superintendent.
Q. Of the grain elevator?
A. Yes, sir.
Q. Did you know John Ambrose in his lifetime?
A. Yes, sir.
Q. Was he employed in this grain elevator?
A. Yes, sir.
[fol. 6] Q. What was the date that this accident happened?
A. July 16th, 1927.
Q. What day of the week was it?
A. Saturday.
Q. Before the accident to Ambrose, how long had he worked in that elevator?
A. Well, to my knowledge, about six or seven years.
Q. He was there thirty years, wasn't he?
A. He was laid off there for a time.

Q. Was he there when you came to work there?
A. Yes, sir.
Q. What general work was he doing besides sweeping up the floor of the elevator?
A. Helping to set trolleys.
Q. What are trolleys?
A. Shoots for putting the grain in the bins.
Q. Where did the grain come from?
A. From the scale floor.
Q. He would sweep up, and he would put these shoots, you say, into the bin?
A. Set them in the holes.
Q. Set them in the hole of the bin?
A. Yes, sir.
Q. And this grain would go through these spo-ts; is that right?
A. Yes, sir.
Q. Did he do anything else besides work at sweeping up and putting shoots into the bin?
A. There was times he would have to go down some of these bins, when there would be grain stuck in. There was times he would have to go into the bins to sweep them out, clean them out. That was what his job was; that was his work.
Q. Describe the bin?
A. It is a storage bin where they store grain.

Mr. Carey: Do you want to look at photographs of the bin?
Mr. Simpson: Thank you.

[fol. 7] Q. Is this picture a picture of the interior of the bin as you would look down?
A. Yes, sir; there is the hole on the bottom.

Mr. Carey: Would you speak a little louder.
The Witness: That is where they let the grain out.

Q. Where does it go into the bin; does it go through this bin?
A. Yes, sir.

Mr. Simpson: I offer this and ask to have it marked.

(Accepted and marked as Plaintiff's Exhibit P-2 of this date.)

Q. And what is this photograph?
A. The level of the floor.

Mr. Simpson: I will have that marked.

(Accepted and marked as Plaintiff's Exhibit P-3 of this date.)

Q. That is where the grain would go into the bin?
A. Yes, sir.
Q. Where would be the opening where you would go into the bin?
A. This square hole (indicating).
Q. To the right of the pole?
A. Yes, sir.
Q. Would they go down in that to sweep it out, when they wanted to sweep it out?
A. Yes, sir.
Q. When would they sweep out the bin on your floor?
A. Whenever they would call from the floor up above; after they had run it, after they would run the grain out, maybe there was a couple of hundred pounds short, they would ask me to look into it.
Q. When was the last time you saw Ambrose alive?
[fol. 8] A. The last time I saw him alive was about 9 o'clock in the morning.
Q. Where was he at nine o'clock?
A. He was sweeping the floor.
Q. Sweeping the floor that I have shown you a picture of?
A. Yes, sir.
Q. Was there anybody with him on the floor, or was he alone?
A. He was alone?
Q. When you left him, he was alone?
A. Yes, sir.
Q. When did you next see him?
A. I saw him down on the bottom of the bin.
Q. What time was that?
A. I should judge about a quarter to ten, or ten o'clock.
Q. In the morning?
A. Yes, sir.
Q. Did anything cause you to look in the bin?
A. I heard a noise.
Q. What kind of a noise did you hear?

A. Something like a sort of hit, something hitting.

Q. Now, prior to your hearing a noise and finding this body, was there any Company working there with gas, exterminating insects in the grain?

A. Yes, sir; they were working on the floor up above, the belt floor.

Q. Their gas was on the floor above where he was?

A. Yes, sir.

Q. What were they doing on that floor?

A. Well, the way I heard it, they were running this grain on the belt floor and putting this powder through the grain as it came along with weevil bugs in it.

Q. Did you see any gas masks there?

A. Gas masks, no, sir.

Q. When you saw this body, then what did you do?

A. I called Mr. Fitzpatrick and told him to try to get Mr. Ambrose.

[fol. 9] Q. Then what did you do?

A. I called upstairs, I think, notified the office.

Q. Did the fireman come there?

A. The fireman came later on.

Q. Were you there when the fireman tried to get the body?

A. No, sir; I was not on the floor.

Q. Did you see the body when it was brought up?

A. When it was brought up from the bottom, yes, sir; I saw it later.

Q. Now, had the men been working on the elevator exterminating these insects every day?

A. They came there on the Tuesday.

Q. Did they work every day there?

A. No, sir.

Q. Well, they worked Tuesday, and what other times?

A. Tuesday and Friday when they drew the grain off.

Q. They were not there on Saturday?

A. No, sir.

Q. What do you mean, "when they drew the grain off"; what did they do to draw grain?

A. Friday afternoon they drew off the grain. I had nothing to do with that; that is done on the bottom floor. I had nothing to do with that.

Q. How many floors were there in the elevator?

A. About five or six.

Q. And when you found this body, did you go downstairs to the floor he had been working on?

A. I was on the floor at the time.

Q. When you heard the drop?

A. Yes, sir.

Q. Did you see him?

A. When I went up there to see what was wrong, I saw him.

Q. He was down at the bottom of the bin?

A. Yes, sir.

Q. You heard a noise, and saw this body at the bottom of the bin?

A. Yes, sir.

Q. Did you go to the place you last left him?

[fol. 10] A. I looked up the floor and I saw the light hanging into the bin.

Q. Did you go up to the floor you had last left him on?

A. Yes, sir.

Q. And what was the condition, what did you see up there?

A. The same as when we came in in the morning; everything was all right.

Q. You speak of a light; where was the light?

A. The light was hanging in the bin.

Q. Hanging up where his body was?

A. No, sir.

Q. Where was it?

A. The light was on a hook where we always kept it.

Q. Was the manhole cover off the hole?

A. When I heard the noise, yes, sir.

Q. What I am asking about is the examination after the man fell; you went up the floor he was working on?

A. That was on the same floor.

Q. What was on the same floor? He had to fall a distance down to the bottom of the bin?

A. Yes, sir.

Q. Was the bottom of the bin and the top of the bin on the same floor he was working on?

A. No, sir.

Q. What I am trying to find out is, did you go up on the floor where the top of the bin was, where you had left him sweeping?

A. Yes, sir.

Q. When did you do that?

A. When I heard the noise, I came out of the shanty; I looked up the floor; I saw this light hanging into the bin and I went and walked up there to see what it was.

Q. Did you see the light from the ground, or where were you standing when you saw the light in the bin?

A. Down at the shanty.

[fol. 11] Q. Is that down on the ground floor?

A. No, that is right on the bin floor.

Q. On the same floor that he was on?

A. Yes, sir.

Q. But not the same floor as the bottom of the bin and the top of the bin?

A. The top of the bin from where he was was 85 feet about; I didn't measure it.

Q. Is that all on the one floor?

A. No, from the bin floor down to the bottom floor.

Q. The bin goes from the floor he was working on down to the bottom floor, does it?

A. Yes, sir.

Q. Did you go up to the floor he was working on?

A. I was on the floor he was working on.

Q. You were on that floor at the time of the accident?

A. Yes, sir.

Q. You didn't see what happened?

A. No, I was in the shanty.

Q. Just a shed on that floor?

A. Yes, sir.

Q. As you came out, what did you see?

A. I looked on the floor and I saw this light hanging from the post.

Q. Where was the light hanging?

A. Into bin 81.

Q. That is the bin the body was found in?

A. Yes, sir.

Q. Was the cover on the manhole, or was it off the manhole?

A. It was off.

Q. How large is this manhole?

A. That I could not tell you exactly; they took the measurements later on.

Q. He had been working there, doing this work that you described, all the time that you had been there, had he?

A. Yes, sir.

Q. Was there anybody else under you besides him?
A. Fitzpatrick.
[fol. 12] Q. How long had he been there?
A. Maybe only a couple of weeks. He was put up there extra like.
Q. What did Fitzpatrick do?
A. He helped settle the trolleys and keep the floor clean also.
Q. Did he help this man that was killed, Ambrose?
A. Well, they both did the same work.
Q. Did he help him in doing the work?
A. Cleaning the bins.
Q. This man that has been working there for two weeks, did he help Ambrose in his work, or was he working separately from Ambrose?
A. No, they both did the same work.
Q. Where was he at the time of the accident?
A. He was on the other end of the floor.
Q. What was he doing?
A. Sweeping the floor.
Q. Were you there when the body came out?
A. No, sir.

Cross-examination by Mr. Carey:

Q. You had been down to the lower floor of the elevator before the accident?
A. That was before the accident.
Q. You came back to what you call the bin floor?
A. Yes, sir.
Q. That is the floor in which there are openings that lead down into the bin?
A. Right.
Q. And when you came back from the first floor, did you notice whether the covers were on these holes over bin 81?
A. They were on.
Q. They were on when you came back?
A. Yes, sir.
Q. And then you went into your shanty?
A. Yes, sir.
Q. You were there about how long before you heard this noise?
A. Maybe twenty minutes or more.

[fol. 13] Q. When you came back from the first floor, did you notice where the light was that you talk of?

A. We always got lights on the sides on a hook.

Q. And that is upstairs, as you see on this picture?

A. No, there was different places; you can't see it on there.

Q. What kind of light was that?

A. We call them inspection lights; they are drop lights.

Q. Electric or what?

A. Electric.

Q. You have a long cord to drop them into the bin?

A. Yes, sir.

Q. Yu have a long cord to drop them into the bin?

A. Yes, sir.

Q. Now, you mentioned being on the ground floor; was this electric light in its proper place on the post?

A. Yes, sir.

Q. And when you came out after hearing this noise, where was the electric light?

A. It was stuck in the post, in the plug and handing into the bin.

Q. How far down in the bin?

A. Well, swinging to the bottom.

Q. The first thing you saw after you came out, and looked, was that this light was gone from its post?

A. No; I looked on the floor; I saw it stuck in the post again.

Q. You mean the light socket on the floor?

A. In the plug.

Q. Was it in the electric light socket?

A. Yes, sir.

Q. The plug was not kept on the electric light socket on the wall only when you were using it?

A. Only if used.

Q. When you came out from your shanty, you found that the plug had been inserted into the socket, and that this [fol. 14] cord was leading down into the bin?

A. Yes, sir.

Q. Now, what was the position of the manhole?

A. It was off.

Q. The manhole cover was off, was it? And was the cover from any of these other holes off at that time?

A. One other cover; that is where the light was.

Q. Where the light's cord went down?

A. Yes, sir.

Q. Now, this Exhibit P-3, as I understand, is a picture of what you call the bin floor?

A. Yes, sir.

Q. Where this man was you were speaking about, Fitzpatrick, was over there (indicating); is that right?

A. Yes, sir.

Q. And where was the shanty?

A. The shanty was down over there. (Indicating.)

Q. Then it was on that floor, wasn't it?

A. Yes, sir.

Q. How many men worked on that floor?

A. There was only three of us.

Q. And they were: yourself?

A. Ambrose and Fitzpatrick.

Q. This picture shows what they call the bin floor; these covers that you see are in the cement floor and they lead right down into steel bins which hold thousands of bushels of g-ain; was that the place where Ambrose was sweeping around this room?

A. Yes, sir.

Q. Now, I call your attention to P-2, which I understood you were testifying from?

A. Yes, sir.

Q. That is a view of the bin looking down through these holes?

A. Yes, sir.

Q. You spoke of a set of trolleys; what does that mean?

A. They set them over the different bins of the shipping bins.

[fol. 15] Q. Is there any difference between the shipping bins and the storage bins?

A. Yes, sir.

Q. Do the shipping bins extend up to this floor?

A. Yes, sir; right level with the floor.

Q. Do they extend down as far as the storage bins?

A. No, sir.

Q. Which was the bin 81, a shipping bin or storage bin?

A. Storage.

Q. In shipping out grain, it is transferred from the storage bins into the shipping bins?

A. Yes, sir.

Q. And shipped out from the shipping bins?

A. Yes, sir.

Q. Were you present when this grain was being drawn off on Friday afternoon?

A. I was up on the bin floor; that was drawn from the bottom floor.

Q. Did you see any of that grain being drawn off?

A. No, sir; I didn't.

Q. You spoke of sending these men, these sweepers, into the bins; that was when you received information from the upper floor that a shortage had been found in connection with shipping grain out of the shipping bin that the grain was being shipped from?

A. Yes, sir.

Q. Now, on receiving information of that character, what would you do?

A. Why, we would put a man on sweeping around to get the grain out of it.

Q. Would any man go into the bin without instructions from you?

A. No, sir.

Q. Is that a rule on that floor?

A. Yes, sir.

Q. So that no man would go down to the floor unless he received orders from you or from the superintendent?

A. He was only to go in on orders of the foreman or the superintendent.

[fol. 16] Q. On the bin floor, any man who went in the bin, went in on the instructions of the foreman?

A. Yes, sir.

Q. Was anybody in attendance at the opening into the bin when the man was sent down into the bin?

A. One man usually stands on top to show the light down to him.

Q. So that two men were needed in the operation; one man went down into the bin and the other showing the light at the top?

A. Yes, sir.

Q. And watching the man in the bin?

A. Yes, sir.

Q. Did you receive any information in regard to looking in there for a bag that was stuck in the bin?

A. I was called up and asked to look to see if I could see a bag in there; they were missing one bag.

Q. Where did that call come from?

A. From the scale floor.

Q. That is above the bin floor, is it?

A. Yes, sir.

Q. What did you do?

A. I took a light and dropped it into the bin and I see the bag there.

Q. Who was with you at the time?

A. Ambrose.

Q. Did you say anything to Ambrose at the time?

A. He asked me what I was taking the light for and I told him what they were doing to bin 81 and that they had lost one of their bags. I told him to keep away from it as much as possible, not to go near it.

Q. Did you at any time give him instructions to go down into that bin?

A. No, sir.

Q. On that Friday or Saturday?

A. No, sir.

Q. Did you know that he was going into the bin?

A. No, sir.

Q. Was there any reason at all for his going into that bin?

[fol. 17] Mr. Simpson: I object to that as incompetent. That is a matter for the jury.

The Court: I will sustain the objection as to whether there was any reason for it.

Mr. Carey: Exception.

Q. You had looked into the bin on Saturday?

A. Friday.

Q. And was there anybody in the bin to get that bag when you looked into it?

A. No, sir.

Q. The grain was all out?

A. All out.

Q. There was no stoppage to the flow of grain from the bin?

A. No, sir.

Q. Nothing in the bin to change the flow of grain at all?

A. No, sir.

Q. From whom did the inquiry come to you with reference to looking into the bin?

A. Mr. Brewer.

Q. Did you report to him what you had found?

Mr. Simpson: I object to that; what difference does that make.

(Question withdrawn.)

Q. Was it necessary that you should open the bin and remove it from the bin?

A. No, sir; not as far as I know; nothing about it was done.

Q. Now, at the time you opened this bin on Friday to look in, was there an odor of gas from it?

A. Yes, sir.

Q. How soon did Ambrose look into the bin; also at that time?

A. Yes, sir.

Q. There was nothing for him to get in the bin except this little bag?

A. No.

Q. You said you told him to keep away; what did you tell Ambrose with reference to keeping away?

A. I told him to keep away from it. I told him I would not trust that stuff.

Q. Was he present at the time the preparation was being [fol. 18] mixed with the grain?

A. It was done in the bin.

Q. Was there anything in connection with this grain that was being run into the bin that required treatment of it in any way?

A. That I don't know.

Q. Do you know what became of this grain after it was drawn off?

A. No, sir.

Q. When you came on the floor on that Saturday morning, did you pass this bin 81?

A. Yes, sir.

Q. What was the condition as to the covers?

A. The covers were on.

Q. And when was the first time that you noticed that any of the entrances had been removed from this bin on Saturday morning?

A. After I heard that noise that Saturday morning.

Q. Did you give any orders to anyone to open these entrances?

A. No, sir.

Redirect examination by Mr. Simpson:

Q. This man worked there for thirty years?

A. Yes, sir.

Q. Do I understand you to say that he was never to move hand or foot unless you gave him a direct order?

Mr. Carey: That is objected to; I don't think there is any such testimony.

Mr. Simpson: I will reframe the question.

Q. Did you not say, as I understand it, on cross examination, that this man who had worked there so long never did a single thing without you directed him to do that specific thing?

Mr. Carey: I object to that.

The Court: I will permit it.

A. Not while I had charge of that floor, no, sir.

[fol. 19] Q. Then he had to speak to you, and you had to tell him to sweep?

A. I would not tell him to sweep; he knew, that was in his line of work.

Q. What did he do besides sweep?

A. That was a standing rule at all time, to keep the floor clean.

Q. He was doing that the last time you saw him?

A. Yes, sir.

Q. You told him to keep away from this place as much as possible; what do you mean, as much as possible?

A. Not to hang around the bin.

Q. Did you smell the odor of gas on Friday?

A. Yes, sir.

Q. Had you gone down to the superintendent and told him about it, that it was dangerous to work up on that floor?

Mr. Carey: I object to that.

(Question withdrawn.)

Q. Did you notify any of your superiors that there was gas on this floor?

A. They knew there was gas.

Q. Did you notify them?

A. No, sir.

Q. What time of the day did you go in and found this bag there?

A. The exact time I don't know.

Q. Was it the afternoon?

A. In the afternoon.

Q. Ambrose was with you, was he?

A. Yes, sir .

Q. You did not get the bag out?

A. No, sir.

Q. You just saw the bag there and you reported to somebody that it was there?

A. Yes, sir.

Q. How far down was that bag?

A. I will show you on the picture.

Q. In feet?

A. In feet I could not say.

Q. Was it near the bottom?

A. I judge, I noticed the rungs; it was about five or six rungs from the bottom, that is the cross pieces.

[fol. 20] Q. Did the gas seem to come from the direction of this bag?

A. Yes, sir; came right up the bin.

Q. You said sweeping was in his line of general work; he would know enough to do that without orders. What else was in his general work?

A. Set trolleys.

Q. What did he do, set them in the bin?

A. Set them for these bins, yes, sir.

Q. Where did this trolley come from?

A. Well, they are not single——

Q. What is the trolley for?

A. It is set in the bin to deliver the grain to the bins.

Q. This was a storage bin, wasn't it?

A. Yes, sir.

Q. Where would the grain come from in this bin when you set the trolley?

A. It came from the scale floor.

Q. Where would it go out of this bin?
A. When they would draw it out from the bottom floor.
Q. At the time of this accident, this bin was empty except for the bag, wasn't it?
A. Yes, that is right.
Q. When had the grain been put through?
A. That same grain they were experimenting with?
Q. Yes?
A. Friday afternoon.
Q. Were they experimenting in this bin after?
A. That one afternoon.
Q. This grain had been drawn off the Friday before?
A. Friday afternoon, yes, sir.

Recross-examination by Mr. Carey:

Q. The setting of the trolleys was done on a direction from you?
A. Yes, sir.
Q. On whose direction?
A. I would get a call and put the trolleys down.
[fol. 21] Q. Sweeping and setting trolleys was work Ambrose was generally employed in?
A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. He was there to do anything he was told?
A. In the line of work, floor work.
Q. Didn't you get orders from upstairs for setting trolleys?
A. Yes, sir.
Q. Would they ever give them to him?
A. No, sir.
Q. They would give them to you?
A. They would give them to me.

JOHN E. FITZPATRICK sworn for the plaintiff:

Direct examination by Mr. Simpson:

Q. Where do you live?
A. West New York.

Q. Were you working in the Weehawken Grain elevator at the time of Ambrose's death?

A. Yes, sir.

Q. Where were you working?

A. Working in the bin floor.

Q. Were you on the same floor with him?

A. Yes, sir.

Q. Did you see what he was doing before he went down this hole?

A. Sweeping the floor, the same as I was.

Q. Where would you put the sweepings; where did they go?

A. Sweep it in heaps; sometimes threw it out of the window.

Q. When all these manholes were covered up, did you sweep the whole floor or only part of it?

A. All over.

Q. Right over the manhole cover you swept?

A. Yes, sir.

[fol. 22] Q. Then you would get it in heaps and then throw it out?

A. Yes.

Q. Where was Ambrose when you last saw him alive?

A. On the floor, sweeping.

Q. And the next thing you knew,—when did you know that there had been an accident?

A. I heard a noise; I paid no attention to it, because I used to hear them around there, knocking; then Mr. Dillworth came running up a few seconds after and he said "Get some help; Ambrose is in the bin."

Q. Did you smell any gas at any time that week?

A. No, sir; I can't smell.

Q. You have lost your sense of smell?

A. Yes, sir.

Q. How far were you from the bin he was found in?

A. Probably a hundred or so feet, or more.

Q. You didn't know anything about this until you heard this noise?

A. No, sir.

Q. What was his general work around there; what did he do?

A. I don't know.

Q. What did you do?

A. Sweep and move the trolleys and help around.

Q. Did you help him in his work?

A. No more than help moving the trolleys.

Q. Did he ever give you any orders, tell you to go help him?

A. No, sir.

Q. Who told you what to do?

A. I got orders from Mr. Dillworth; got an order to set the trolleys or move them.

Q. Mr. Dillworth would tell you the trolley to move, and you would go and move it along with Ambrose?

A. Yes, sir.

Q. How long had you been working there?

A. Two weeks.

Q. That is all you did, all the work you did on that floor; you didn't do anything else?

A. No, sir.

[fol. 23] Cross-examination by Mr. Carey:

Q. Were you present on the bin floor on Friday afternoon when this grain was drawn off?

A. I was on the bin floor.

Q. Did you hear anything of a bag being missing?

A. No, sir.

Q. Did you see Mr. Dillworth and Mr. Ambrose at bin 81 on Friday afternoon?

A. No, sir.

Q. Opening up the bin and looking into it?

A. No, sir.

Q. You didn't see them?

A. No, sir.

Q. Did you hear Mr. Dillworth say anything to Mr. Ambrose about keeping away from bin 81?

A. No, sir.

Q. You didn't hear?

A. No, sir.

Q. Did you notice whether the covers were on bin 81 on Friday afternoon?

A. Yes, sir.

Q. Were they?

A. Yes, sir.

Q. On Saturday morning, what time did you go to the elevator to work?

A. About eight o'clock.
Q. You passed bin 81?
A. Yes, sir.
Q. At what time?
A. I could not just say; it was before eight o'clock.
Q. Do you know whether or not Ambrose was on bin 81?
A. I don't know.
Q. Did you see anybody removing these covers?
A. No, sir.
Q. When did you first know that anything had happened to Ambrose at bin 81, that he had been injured?
A. I didn't know anything about it until the accident.
Q. Until after the accident?
A. After the accident.
Q. Did you go to bin 81 after the accident?
A. No, sir.
Q. Didn't go there?
A. No, sir.

[fol. 24] Redirect examination by Mr. Simpson:

Q. How many covers were on bin 81?
A. That I could not tell; I am not familiar with that, I don't know.
Q. Mr. Carey asked you how many covers were on there that morning; do you know whether they were on or not?
A. No, sir.
Q. How high were the covers from the floor?
A. Level.

PAUL S. SHANAHAN sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. What is your occupation?
A. Superintendent on grain elevator.
Q. You were in complete charge of it?
A. Yes, sir; of the elevator.
Q. Of that elevator; I am talking of that one elevator?
A. Yes, sir.
Q. Was there any exterminating company doing anything in that elevator with a view to exterminating vermin?
A. Yes, sir.

Q. What company was doing the exterminating?

A. Air Reduction Sales Corporation and the Cal Cyanide Co.

Q. Where were they doing this?

A. Pier 7, Weehawken.

Q. Is that where this elevator is?

A. Yes, sir.

Q. During the time this exterminating was going on, were you present at all?

A. No; I was there on Friday.

Q. What were you doing while you were there Friday?

A. I was at lunch; I went to lunch about 11:30 and got back about 1 o'clock; it was on Tuesday, I believe, if I recall the correct day.

[fol. 25] Mr. Carey: Louder and talk to the jury.

The Witness: On Tuesday afternoon, or Tuesday about 11:30 I went to lunch and on my return, my chief clerk notified me that Mr. Hubbell, representing the Cyanide people, and a representative from the Air Reduction Company, were there and wanted to have the use of this elevator to experiment in the extermination of insects in the grain.

Q. Will you tell us what that is?

A. Boll weevil, similar to the boll weevil that is in cotton. It was centered in the soft winter grain, all through the southwest, and they wanted to experiment with it in this grain.

Q. They wanted to experiment with this gas on these insects?

A. Yes, sir.

Q. Did you see what they did when started to work there?

A. I went up and asked this Mr. Hubbell if he had secured the authority to go ahead with this experiment. He said that he had previously experimented, and he would get me a letter assuming all responsibility relative to anything that would happen or any damage done by this experiment which he intended to do. Eventually he satisfied me that he can get letters to authorize him to go ahead with the experiment.

Q. What did he do after that?

A. Why he had a man operating the apparatus for distributing the cyanide through the grain at a certain specified flow.

Q. About what time did he satisfy you he could get a letter?

A. Shortly after lunch. I got back about 1 o'clock, or in that neighborhood.

Q. Then what did you do?

A. I had to go upstairs there with him. As far as his [fol. 26] experiment was concerned, our men would have nothing whatever to do with it, he would have to carry out his experiment himself, with his own employees. We would give him the stuff, the men would have the grain ready to go into the bin. We issued our instructions that none of our men should go near that bin while the cyanide was being used.

Q. Did he say how long it would take to do this experimenting?

A. It would stay in there about 72 hours.

Q. When was the first day they started?

A. Tuesday.

Q. So that they worked on and off there Tuesday?

A. No, they didn't work off and on. They put the stuff in on Tuesday afternoon.

Q. Where did they put the gas in, into the grain?

A. They were to put the weevil bags in there to be used in the test.

Q. On Tuesday he started putting these things in the grain?

A. Yes, they put the weevil in; they put this boll weevil in in bags.

Q. They put the insects in too?

A. In bags.

Q. In these little bags, carrying these insects?

A. Yes, about forty bags.

Q. Do you know they did that?

A. Put them in and then they had this distributing machine with a little motor on it, which would be adjusting itself to the proportion of the flow of grain.

Q. Was it near this bin 41 they were working?

A. 81?

Q. Was it near this bin?

A. No, it was above.

Q. There is some testimony about one of the bags being caught in the bin; do you know anything about that?

A. That happened evidently when they pulled it off on Friday.

Q. Do you know of any time they were working in the [fol. 27] vicinity or in bin 81 with the gas?

A. No, not to my knowledge.

Q. When he told you he would assume all responsibility, he didn't supply any gas masks, or printed notices, or anything of that kind?

A. None whatsoever.

Q. These bins that the gases were in were not sealed at the top so that the gas could not get out?

A. There was only one bin.

Q. This bin was not sealed?

A. That was the only one we were using.

Q. It was not sealed at the top?

A. No.

Cross-examination by Mr. Carey:

Q. When you told this man you wanted him to get a letter showing authority for experimenting in the elevator, you meant letters from whom?

A. From the New York Central Railroad.

Q. Did he do it?

A. No, sir.

Q. Did you ever receive any such letter?

A. No, sir.

Q. You spoke about a machine for distributing the gas in the grain?

A. Distributing the powder; it was not gas; it was in powder form.

Q. So that when this drug was applied to the grain, it was in powder form?

A. Powder form.

Q. How did the gas result from that powder that was distributed in the grain?

A. Coming in contact with the air and the moisture contained in the grain, nine per cent gas, and air would form it into the gas; that is the way it was explained to me.

Q. Did he say that?

A. He said that it goes in in powdered form, and coming in contact with the moisture contained in the grain, which is natural containing a certain percentage of moisture, it forms a gas after it arrives in the bin.

[fol. 28] Q. So the gas is formed after the powder and grain are in the bin?

A. So they informed me.

Q. Now, this powder was mixed with the grain on the floor above the bin floor?

A. Yes, sir. Into the spout.

Q. And then it came down through the spouts?

A. Yes, sir.

Q. And into the bin?

A. Yes, sir.

Q. Was this running of the grain into the bin all completed on Tuesday?

A. Yes, sir.

Q. Do you know whether the bin was then covered or not?

A. Yes, sir; I was instructed that Mr. Hubbell was to look after that matter.

Q. Were you on the bin floor after Tuesday?

A. Yes, I had been up there. I don't recall just what day it was. I had a conference with Mr. Dillworth. I told him to keep everybody away from the bin. I just don't remember what day it was.

Q. Was this grain which was run through that experiment treated in any way for the preparation of the grain for shipment?

A. No, did not need any treatment.

Q. The weevil which were in the grain were put in by the experimenters?

A. By the experimenters.

Q. Did you see any of these bags of weevil after they were taken out on Friday?

A. Yes. Friday night.

Q. Did you notice what the condition of the weevil was?

A. About eighty per cent killed, on account of them losing a bag, that would bring it up, the percentage to 100 per cent kill.

Q. After this grain had been treated in the way you speak of, and after it was drawn off, what was done with it?

A. Put back in storage.

[fol. 29] Q. It was taken from storage and put back in storage?

A. It was taken from storage and put back there.

Q. You have informed that one of these little bags had been lodged in the bin?

A. I don't recall; I think I was, yes, sir; Friday I think Mr. Hubbell said that one of his bags was gone, but it was immaterial.

Q. Did you look into the bin?

A. No, sir, not at that time; I was leaving for Buffalo.

Q. The removal of this little bag with some weevil in it, was it necessary for the operation of the elevator bin that they should be removed?

A. No, sir.

Q. Would you have had it removed at any time?

A. No, sir.

Q. What was the rule with respect to men going into bins?

Mr. Simpson: I object to that. If the rule is in writing, it ought to be produced. If it is not in writing, it has to be shown where it was brought to the attention of the deceased.

(Argued and question withdrawn.)

The Court: How would you get into this bin, if a man wanted to go in.

The Witness: Would have to lift the cover off; first, before that, he would have to get a light and drop it down. He would have to lift the cover off and climb down the ladder.

The Court: There was no way of getting through the bottom?

The Witness: Not without a ladder put through the opening in the lower part of the bin.

[fol. 30] The Court: There were no openings on the way down?

The Witness: No, sir.

The Court: No opening in this bin except the one at the top?

The Witness: Yes; there is one for the manhole and one for the spout.

Q. Did you give any instructions to your foreman, Dillworth, with reference to the men going into the bin?

A. That would have to go back to the time I took charge of the elevator for permission to do that.

Q. I am directing your attention to instructions with reference to sending men into the bin?

A. When I took charge of the elevator, there was no system on the floor. I put a man in charge of everything, took charge of instructions and there was no orders to be taken from any man unless it came through the proper channels and would go through him.

Q. What instructions did you give him with reference to sending a man or directing a man to go in the bin?

Mr. Simpson: I object to that unless he points out who is meant by "him."

Q. I mean Dillworth, the foreman?

A. I instructed Dillworth that no man was to do it, to instruct his men that no man was to go into the bin without direct instructions by him or from him, received either through the Chief Weighmaster or through the office.

Q. Did you give any instructions there Friday that no one was to go into the bin?

A. I gave instructions on Tuesday for the men to keep away.

Q. Did you give any instructions there on Friday after- [fol. 31] noon, after the grain was drawn off, until after this accident, that no one should go into the bin?

A. No, sir; only previous.

Q. Were you there up to the time the grain had been completely drawn off from this bin on Saturday?

A. Yes; Friday.

Q. Was it all drawn off from the bin?

A. Yes, sir.

Q. I think you have testified already with respect to the condition of this grain, and whether or not it was infected in any way?

A. It was not.

Redirect examination by Mr. Simpson:

Q. How long had Mr. Ambrose worked there at the time of his death?

A. I think I re-employed Mr. Ambrose as soon as I came there. I don't recall exactly, but about six and a half years.

Mr. Carey: I can't hear you.

The Witness: I employed Mr. Ambrose shortly after I took charge of the elevators.

Q. To do what?

A. House man.

Q. What does that mean?

A. It means we have them assigned to two different types of work. We had two of them on the bin floor, one of them down in the office; he works wherever we assign him to for specific work; at that time, assigned to work under one of the heads of departments——

Q. He was the houseman assigned to this floor on the day of his death?

A. Assigned to Mr. Dillworth.

Q. And he took charge, you told Mr. Dillworth nobody was to go into the bins without instructions from him?

A. Yes, sir.

Q. You left it to Dillworth to carry that out?

A. Yes, sir.

[fol. 32] Q. You testified you told everybody to keep away from this bin 81?

A. I didn't tell everybody; I always give my instructions to the head of the department.

Q. You gave instructions to Dillworth to keep everybody away from bin 81; that was Tuesday?

A. Yes, sir.

Q. Did you know he had taken the cover off and with Ambrose looked down in the bin?

A. He had instructions.

Q. He received them from whom?

A. From the lower floor, from Mr. Brower to Mr. Dillworth.

Q. To do that?

A. Yes, sir.

Q. So that the fact of your telling him to keep everybody away on Tuesday had no effect on him then?

A. That was an order.

Q. Then Dillworth and Ambrose both took the cover off and looked in?

A. Yes, sir.

Q. Did Dillworth report to you that when he looked in there, there was a smell of gas?

A. No, sir.

Q. Were you instructed by the people in charge of this cyanide gas that this gas was instantaneous death?

A. I knew that.

Q. You knew that it was instantaneous death?

A. Yes, sir.

Q. Do I understand you to say that Ambrose was to be assigned to every specific task; for instance, if the floor was to be swept up, that he could not start to sweep up the floor unless Dillworth told him?

Mr. Carey: I object to that; there is no such evidence.

The Court: The question is, is that what he means.

[fol. 33] Q. Is that what you mean: this dead man could not pick up a broom to sweep the floor; he could not adjust a trolley, unless he was ordered to do that by Dillworth; unless Dillworth told him to do that very thing; is that what you mean?

A. That is the rule there. There is a certain amount of judgment to be used on every rule. You can't stand on an iron-clad rule.

Q. Wasn't he left to his own common sense in certain things?

A. No, Mr. Dillworth was instructed to give him such orders as he saw fit.

Q. When Dillworth took him and opened the cover and stuck him over to look in, the bin was already filled with cyanide gas in the bottom?

A. No.

Q. Now, you say that Ambrose was not left to his own judgment in doing anything. He could not take up a broom without Dillworth saying "you take up that broom." He could not sweep the floor unless Dillworth said "Sweep the floor." He could not put on a trolley unless Dillworth told him "Put on a trolley." Is that what you swear?

Mr. Carey: I object to that; there is no such evidence in the case from anyone. That is based upon an assumption of facts that do not exist.

The Court: As I understand, it does not purport to be a question from the testimony that is in, but is asking him what he means, if that is what he means.

The Witness: That was my idea in starting there, with Dillworth there, to prevent that.

Q. Prevent them from doing what?

[fol. 34] A. From anybody doing anything they want to do, that is, promiscuously.

Q. If Dillworth told him to go and look through a hole in a bin where there was cyanide gas, was he to do it?

Mr. Carey: I object to that; there is no evidence that Dillworth told him to look in.

(Argued and question withdrawn.)

Q. Do you know anything about Dillworth's daily work with this man; did you check up on him or simply leave it to him?

A. Go through the place occasionally to check up on all the workmen.

Q. Do you go through every day?

A. No, not necessarily.

Q. In other words, Dillworth was put over this floor, and he was supposed to be doing whatever in his judgment was right to do on that floor?

A. Whatever was the instructions from the top floor.

Q. Who is the top floor?

A. The Chief Weighmaster's department. Chief Weigher.

Q. What did the Chief Weigher do?

A. He gave him instructions as to the spouts they wanted set, where they wanted them set, what bins, what bins to use.

Q. And he would clean up the bins on that floor?

A. It is very rarely they clean up the bins.

Q. You just let the grain remain there?

A. They are self cleaning, the majority of the bins.

Q. How do you know whether a bin is clear, or whether there is anything in there?

A. Because when the bin runs out of the bottom, the shipper received an invoice and checks up with the weigher.

[fol. 35] Q. Is it necessary to take the manhole cover off when the bin is being filled?

A. Either the manhole or the spout hole when the spout fits in there——

Q. Do you know whether anybody got that bag out that was found in there?

A. No.

Q. You didn't tell these men that there was cyanide gas in there, and that if they inhaled it, it would kill them instantly?

A. No, sir.

Recross-examination by Mr. Carey:

Q. How long is the bin floor?

A. It is in the neighborhood of 300 feet long, about 130 feet wide; I don't know exactly.

Q. You spoke about being in complete charge of the elevator; you mean by that in full charge of the operations, of the ordinary business of the elevator?

A. Well, everything, the business operation.

Q. Did you have any authority with respect to granting permission to people to go in there and make experiments for their own purposes?

A. None whatever.

JOHN D. AMBROSE sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Where do you live?

A. 113 13th Street, West New York.

Q. It is your father who was killed?

A. Yes, sir.

Q. Did you on summons go to the place where he was killed?

A. Yes, sir; I did.

Q. What time did you get there?

A. I got there about twenty minutes to eleven.

Q. In the morning?

A. Yes, sir.

Q. What was the condition when you got there?

A. Why, the condition when I got there, I asked what was the matter.

[fol. 36] Q. Did you see your father's body?

A. No, when I arrived upon the floor where he worked, I wanted to go down there, but they told me I could not anyway.

Q. What is your business?

A. West New York police, traffic officer.

Q. Do you live in West New York?

A. Yes, sir.

Q. Did you go right to the place where he was killed through the action of the cyanide gas?

A. I didn't go right to the place. I am acquainted with the place; I know the building. I went looking through the building. I was on the motor floor and I found three other cans up there.

Q. Where?

A. On the motor floor; there is two floors above the bin floor.

Q. It is in the elevator?

A. In the elevator, on the motor floor.

Q. Now, what time of the day did you find it?

—. Half past eleven or a quarter to twelve the same morning.

Q. Where did you say you found these, in the elevator?

A. On the motor floor.

Q. How near is that to this bin 81?

A. Well, that is about, I am not sure if two or three floors above it; it would not be more than about 150 feet from bin 81.

Q. Were there more cans than these?

A. Yes, there was three other cans besides that one.

Q. Containing material like this?

A. Yes, sir.

Q. Did you deliver this can to Mr. Sinnott of my office?

A. Yes, sir.

Q. You delivered this can to him?

A. Yes, with my brother.

Mr. Simpson: I will have this marked for identification only.

Marked for identification as Plaintiff's Exhibit P-4 for Identification.

[fol. 37] JOHN A. SINNOTT sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. You are employed as an investigator by me?
A. Yes, sir.
Q. The last witness delivered this can and its contents to you?
A. Yes, sir.
Q. When did he do that, do you know?
A. I should judge about a month ago.
Q. Did you take these contents or any part of the contents to anyone?
A. Yes, sir; I took it to Mr. C. L. Devitt, Chemist; also to Dr. Sachs at the North Hudson Hospital.

Cross-examination by Mr. Carey:

Q. When did you receive this can?
A. About a month ago.
Q. You delivered it immediately to the doctors?
A. Yes, sir.

JOHN D. AMBROSE recalled.

Direct examination by Mr. Simpson:

Q. Was the can and contents I showed you in exactly the same condition when you delivered it to my office as when you found it?
A. Yes, sir.
Q. You had not touched it at all?
A. I had not touched it at all; in the same condition.

Cross-examination by Mr. Carey:

Q. Where had it been kept during this time?
A. It had been kept in my cellar.
Q. What was the date when you got it?
A. The same day that father was killed, July 16th, 1927. At half past 11 in the morning when I got the can.
[fol. 38] Q. This can has been kept in your cellar since that time?
A. Yes, sir.

Q. Until you delivered it to Mr. Simpson?

A. Until I delivered it to Senator Simpson's office.

Q. Lots of people have access to your cellar besides yourself?

A. Not in our apartment house; the apartment is locked.

Q. Do you mean that?

A. Absolutely; it is two families. We have two rooms in the cellar; one for the tenant downstairs and one for us.

Q. Nobody but yourselves have access to your compartment?

A. Nobody outside of my mother and myself, the family of course.

Q. Your mother and yourself?

A. And my brother Willie.

Q. But other people go in there occasionally?

A. None whatever in our compartment in the cellar; the tenant downstairs goes in theirs.

Q. Nobody but you and the members of your family ever get into that compartment?

A. Absolutely not.

Q. You are sure about that?

A. Yes, sir.

Q. You are there all the time?

A. I am not there all the time, but I keep it locked all the time.

Q. You carry the key?

A. I don't carry the key.

Q. The key is left in the house?

A. Yes, sir.

Q. You are away eight or ten hours?

A. About eight or ten hours a day.

Q. And you don't know who goes in there when you go away?

A. Nobody but my mother.

Q. How do you know nobody but your mother goes into that compartment?

A. Because the keys are upstairs; nobody can go in unless they break it in.

[fol. 39] Q. Couldn't your mother let somebody in there?

Mr. Simpson: I object as a conclusion on his part.

Q. You mean to swear that nobody but yourself or your mother has been in that compartment from the time that can

was taken there until you delivered it to Mr. Simpson's man?

A. I will swear I seen nobody in there.

Dr. HAROLD M. SACHS sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. You are a practicing physician and surgeon?

A. Yes, sir.

Q. Where do you practice?

A. At the present time I am completing a twelve months internship at the North Hudson Hospital.

Q. Were you called to the Weehawken Grain Elevator on the 16th of July, 1927?

A. Yes, sir.

Q. Were you then connected with the North Hudson Hospital?

A. Yes, sir.

Q. How did you get to the elevator, on the ambulance?

A. At that time I was on the second month of my service and so I was riding the ambulance.

Q. When you got there to the Weehawken Elevator what did you see, what condition did you see?

A. They took us up to the top floor of the elevator and there was a lot of commotion around and they offered me a gas mask. As I entered I smelled, as I entered the fourth floor, or whatever the floor, an odor.

Q. Did you smell gas?

A. I smelled a peculiar odor of gas. Then I went over to where the excitement was. They gave me a mask and [fol. 40] told me to go down and bring the body up, or pronounce him dead. I looked down this bin and saw a lifeless body down there, and there was no motion in the body and I had to go away immediately, because the odor was too strong, and I was told that in the gas mask was ammonia.

Q. You were then in this position, as I understand it, showing you this photograph, looking down this bin 81 where this odor of gas was strong?

A. Yes, sir.

Q. On this floor; this is a picture looking down; you were on the floor on the top?

A. I was on the top.

Q. You say the odor of gas was so strong, you had to get away?

A. I had to go away.

Q. When you went away, did anybody put the gas mask on, and was anybody lowered down with a rope?

A. In the meantime, I believe the West New York Fire Department was called and one of the firemen came and he volunteered to put the gas mask on and go down. I told the fireman at the time——

Mr. Carey: I object to what he told him.

The Witness: He went down, the fireman went down. I believe he went down approximately about ten feet and he started signalling with his hands, he asked to be taken up. He was taken up immediately and he was taken away.

Q. Did he faint as soon as he got out?

A. I didn't see the finish.

Q. You were then on your way?

A. It was suffocating gas——

Mr. Carey: I object.

The Witness: He was taken away from the manhole.

[fol. 41] Q. Did he indicate any symptoms of incipient suffocation?

A. He was giddy and dizzy and showed signs of vertigo which is the initial symptom of suffocating gas.

Q. He was taken away; what is the next thing that happened?

A. We stood around there and saw it was useless for anybody to go down there to pronounce the man dead, or bring the body up. So they decided that the only way was to bore a hole from the bottom of the bin and bring the body through. I think I called the hospital and told them I would be down with the ambulance another hour. I stayed around until about 11:30 and the body was taken out and I pronounced the man dead.

Q. Did you form an opinion as to the cause of death?

A. The cause of death I gave on the emergency card, which we had to fill in.

Mr. Carey: I object to that.

The Witness: I took the body; the body was taken——

Q. Don't tell us about the emergency card. Did you form an opinion from what you saw or observed of the body and the surroundings as to the cause of death?

A. I pronounced the man dead.

Q. Then the answer should be yes?

A. Yes, sir.

Q. What was your opinion as to the cause of death?

A. My cause at the time was cyanide poisoning.

Q. Now, you know something of chemistry, don't you?

A. Yes, I have the M. S. degree.

Q. You have a degree of chemistry?

A. Yes, sir.

Q. Did Mr. Sinnott hand to you the contents of this can, part of the contents of the can?

A. Yes, sir.

[fol. 42] Q. Did you analyze it?

Mr. Carey: How do you know it was part of the contents of the can?

Mr. Simpson: I withdraw the question.

Q. Did Mr. Sinnott hand you a substance for analysis?

A. Yes, sir.

Q. Was the substance handed to you cyanide?

A. Yes, sir.

Q. What are the symptoms of cyanide poisoning, when a man is killed with cyanide gas, is it quick or slow; how does it act?

A. It depends on the quantity present.

Q. Can a man take enough to cause instantaneous death?

A. Yes, if the body is so dense, death almost instantaneously.

Q. How does cyanide act on the heart?

A. Cyanide acts on the central nervous system. It is immediately taken up through the blood; and acts on the centers of the brain; it causes interference with the respiration; the patient ceases to breath almost immediately.

Q. Also accompanied by the symptoms you saw in the fireman after the fireman got through there, the dizziness, vertigo?

A. Those are the initial symptoms.

Q. That is dizziness and vertigo?

A. Yes, sir.

Q. What was done with the body, was it taken to the hospital, or what happened to him?

A. No, the body was taken to the morgue. When a man is pronounced dead, we do not remove him to the hospital.

Cross-examination by Mr. Carey:

Q. Did you examine this body after it was taken out?

A. Yes, sir.

[fol. 43] Q. What did your examination consist of?

A. I listened to his heart. There was no evidence of any life. I examined his pupils; the pupils were dilated. The odor on his clothes was that of a pungent, offensive odor, suffocating odor. As a matter of interest, I also examined a few bones. He had a fracture of both bones of the left arm. I was questioned at that time by a certain gentleman——

Q. Never mind about that; I am asking what you did?

A. As I said, I examined his heart and pulse; he was pulseless; the pupils were dilated, and I pronounced him dead.

Q. Is that all the examination you made of him?

A. Yes, I examined him grossly for injuries to his extremities.

Q. Did you find any injuries to his extremities?

A. I did find a fracture, I think of his left forearm. I didn't put it on my emergency card. I didn't care to go any further, to ascertain whether or not he had a fracture of the skull.

Q. What I want to know is just what you did by way of examination; you did not examine for fractured skull?

A. No.

Q. Or for any fracture except fracture of the forearm?

A. Yes, sir.

Q. He may have had various fractures about his body, without your having discovered them?

A. Yes, sir.

Q. He may have been killed by the fall?

Mr. Simpson: I object to that; how can he say he may have been killed by the fall. He tells us that in his opinion

this man died of gas poisoning. That is entirely too speculative.

The Court: Sustained.

[fol. 44] Q. Wasn't his body pretty badily bruised?

A. No.

Q. From just this examination which you have testified to, you concluded that he died of cyanide poisoning?

A. Yes, sir.

Q. Nothing else?

A. He might have died of—There was enough cyanide gas there, sufficient——

Mr. Carey: Just a minute.

Mr. Simpson: I object to counsel interrupting the witness.

The Court: Give a responsive answer to the question and nothing else.

The Witness: There was sufficient gas there to cause the giddiness to make the man fall and if he did fracture his skull, which I was not interested in at the time, that was secondary.

Q. When you say that there was sufficient gas there, to what time do you refer?

A. About 9:50 A. M.

Q. Is that the time you were there?

A. The accident happened at 9:50. We got down in the ambulance probably at 10 o'clock.

Q. Are you speaking of the condition as to the time you were there, or at some other time?

A. At the time I was there.

Q. Where did you note that gas condition?

A. I was aware of the gas as soon as we were taken up to the top.

Q. Where did you notice sufficient gas to result in death, as you have testified?

A. At the top of the manhole there was sufficient gas.

Q. What was your position over the manhole at the time you discovered this strong odor of gas?

A. Well, I was bending over. As I was bending over, I [fol. 45] saw the body and smelt this very pungent odor of gas.

Q. Was your face down close to the opening?

A. No, I got away pretty quick.

Q. I don't think you understand my question. When you first discovered this pungent odor of gas, were you bending over the opening at the manhole?

A. I was bending over, yes, sir.

Q. How close was your face to the manhole?

A. I should judge about three feet.

Q. How long did you remain in that position?

A. Probably about five seconds.

Q. Then you got away?

A. Then I got away.

Q. The gas was sufficiently strong so that anyone who was in the position you were in, would have been immediately aware of the fact that there was a strong current of gas?

A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. What does dilation of the pupils indicate, do you say; would that indicate to you cyanide poisoning?

A. Dilation of the pupils is a sign of cyanide poisoning, but at the same time it is also a sign of death.

Q. Is it a sign of cyanide poisoning?

A. Yes, a sign of cyanide poisoning.

Q. Did you find that sign?

A. That sign was present.

Q. As I understand you got there at 10 o'clock?

A. Approximately.

Recross-examination by Mr. Carey:

Q. What else is dilation of the pupils a sign of?

A. Why dilation of the pupils is a sign of death. I want to bring out a point here; had the man had a fractured skull at the time—

[fol. 46] Q. Tell me what else dilation of the pupils is evidence of besides cyanide poisoning?

A. Dilation is a sign of death.

Q. It is a sign of cyanide poisoning and of death; that is all?

A. Oh, no, dilation of the pupils could occur in a fractured skull; could occur in numerous conditions.

Q. A blow or fall would produce dilation of the pupils, wouldn't it?

A. Yes, but not equal dilation of the pupils. If a man with a fractured skull was injured on the right side, he would not have dilation on the right side, but on the left side; there would be a dilation of the left pupil, but not of both pupils.

Q. Well, suppose the blow was in the middle of the forehead?

A. It would all depend upon the pressure on the nerve that was irritated.

Q. So it would in respect to any trauma or blow, wouldn't it?

A. Yes, sir.

Q. Is there anything else that dilation of the pupils is indicative of?

A. Why, drugs cause dilation of the pupils.

Q. A great many things?

A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. Mr. Carey stopped you when you said you wanted to bring out some information or point; what was that?

Mr. Carey: I object to that.

Q. What were you referring to when you said about bringing out a point here, when Mr. Carey said "never mind." What were you referring to just a minute ago?

[fol. 47] Mr. Carey: I object to that as improper and immaterial.

The Court: Sustained.

Q. You understand what I mean?

A. I don't just recall.

Q. You said "here I want to bring out a point," and Mr. Carey shut you off and said "never mind the skull." Can you remember what you were trying to tell the jury?

Mr. Carey: I think the Court sustained the objection to that.

The Court: Sustained.

Q. Will you tell me what you meant when you said "I want to bring out a point here." What were you going to discuss?

A. I think I know your point.

The Court: I think you should reframe the question.

Q. What was it you wanted to bring out?

Mr. Carey: May I have an exception noted.

A. The man possibly could have had a fractured skull. No doubt a man falling the depth that he fell, he should have had some fracture and I was not interested to find out whether he had a fractured skull or not, but the point that I want to bring out, that the gas was of such density and so strong that it was sufficient enough to make a man dizzy, to permit him to fall so that if he did have any fractures, they were secondary to the initial gas.

Recross-examination by Mr. Carey:

Q. Do you know how far he fell?

A. I don't know. I believe somebody said about 300 [fol. 48] feet. He fell from the top.

Q. You don't know anything about the extent of the fall, do you?

A. Why, he fell from the top.

Q. How do you know that; it would be very interesting if you know that. Lots of people would like to know it. You don't know anything about where he fell from?

A. The depth of the fall I could not tell you.

Q. You don't know what his position was when he fell?

A. No.

Q. You were not there at all?

A. No.

Christopher L. Devitt sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. What is your profession?

A. Chemist; analytical chemist.

Q. Where do you practice your profession?

A. Jersey City.

Q. Did you receive a substance from Mr. Sinnott of my office for the purpose of analysis?

A. On April 19th I received this packet from your office.

Q. What was it, what was the contents of it?

A. Well, the contents were a brown powder, a small amount, possibly an ounce or two.

Q. What was it?

A. In the bottom of the can, examination showed it to contain a small per cent of calcium cyanide one and one-tenth per cent.

Q. Is that the cyanide used to make cyanide gas?

A. Yes, sir.

Q. Does the gas liberate itself freely?

A. From this material, yes, sir; from this material, exposed to the atmosphere, cyanide gas is liberated.

Q. So that if the can was obtained on the 16th of July, [fol. 49] 1927 and you analyzed it in April, 1928, the strength of it in April would not indicate the strength of it in July; it would have lost a lot of its strength?

A. It would have lost a great deal of the cyanide.

Mr. Carey: No cross examination.

WILLIAM J. DILLWORTH recalled.

Direct examination by Mr. Simpson:

Q. The superintendent has designated some of the employees as being house men; what is a house man?

A. House man? What they are? I know I had two men on the floor with me.

Q. What does the term "house man" mean?

A. I could not really tell you what it means.

Q. Was there any system of bells for you and for this man who is dead, Ambrose?

A. Any bells?

Q. Two bells for you and three for Ambrose; did you have any system of bells?

A. No, sir.

Q. Any bells used at all in that work?

A. Yes, sir.

Q. Who was it sounded the bells?

A. The man upstairs.
Q. Who were they?
A. There is one of them here.
Q. What is his name?
A. John Brewer.
Q. What did he sound the bells for?
A. To notify us to set a trolley or something like that.
Q. Was there any particular number of bells for a trolley?
A. No, sir.
Q. How many bells would he sound?
A. Probably two.
Q. What would two mean?
A. That would mean to answer the bell and go to the [fol. 50] speaking tube.
Q. See what he wanted?
A. Yes, sir.
Q. Was there three bells sounded?
A. No, sir.
Q. Only two bells always sounded?
A. Yes, sir.
Q. They were sounded by the weighers?
A. Yes, sir.
Q. What did the weigher do up above; what was his work?
A. Weigh the grain.
Q. And he would notify you when it was ready to go into the shoots?
A. Yes, sir.
Q. One thing I omitted to ask you about, when you came back how many covers were off these manholes?
A. Only one cover off the manhole and one spout hole. There is four covers in this one bin.
Q. Four on this one bin; what were they?
A. Three spout holes, one manhole, that is, larger hole.
Q. When you came up to the top of the bin, were they all off, or only two covers off?
A. Two, the manhole and the one covering the spout hole.
Q. The spout hole and the manhole cover?
A. Yes, sir.
Q. Would you have to take the spout hole cover off to put the spout on?
A. Yes, sir.

Q. How large was this hole that was open by the manhole cover?

A. I don't know really how large it was.

Q. Was it ten feet or not, ten feet circumference?

A. No, sir.

Mr. Carey: I can give you the measurements, if you want. The measurements which I have are 20 inches by 16¾ inches.

[fol. 51] Q. What was the purpose of that, to go down in the bin?

A. Yes, sir.

Q. There was a ladder led right from that?

A. Yes, sir.

Q. Down into the bin?

A. Yes, sir.

Cross-examination by Mr. Carey:

Q. I thought you testified you didn't know what became of this grain after it was put in the bin?

A. No, I don't know what became of it.

Q. You found one spout hole uncovered and the manhole uncovered when you got there after the accident?

A. Yes, that's right.

The Court: What is the size of the spout hole and the manhole?

The Witness: I don't know what size they are, to tell you the truth.

The Court: I don't mean in inches or feet, or anything of that kind; just as you saw them, did they look to be large?

The Witness: The manhole is a little bigger.

The Court: The manhole is a little bigger?

The Witness: That is square and the other hole is round.

The Witness: The manhole is square and the other cover is round?

The Witness: Yes, sir.

Mr. Carey: I have the diameter of the other holes, if counsel would like to have it stated.

Mr. Simpson: Yes.

Mr. Carey: The three circular holes were seventeen inches in diameter.

[fol. 52] JOHN T. BREWER sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Where do you live?

A. Dumont, New Jersey.

Q. Are you employed on the Weehawken Grain elevator which has been under discussion here?

A. Yes, sir.

Q. Were you employed there on July 16th, 1927?

A. Yes, sir.

Q. How long had you been working there before that date?

A. Fourteen years.

Q. What was your duty there?

A. Shipping weigher.

Q. What did you actually do, physically do?

A. Weigh grain.

Q. You weighed grain, on what kind of scale?

A. 800 bushel Fairbanks scale, weighs automatically.

Q. After being put on there; then you weighed it, and what was the next thing you did?

A. Well, it is according to what I was going to do. If I was going to ship, I would have sent word to have a shipping bin ready; I would notify them to have a trolley there.

Q. What kind of bin?

A. Twelve thousand bushel bin.

Q. If you want to use that bin, what do you do, if you wanted to get the attention of the man on the floor where the top of the bin was; what would you do?

A. I would ring the bell.

Q. How many times?

A. Well, it makes no difference, two, three or four. If I wanted to get him quick maybe five or six.

Q. And somebody would speak to you through the tube?

A. Through the tube.

Q. Would only one person talk to you, or anybody on the [fol. 53] floor?

A. I used to call for the foreman of the floor.

Q. For no other one there?

A. The next man in charge.

Q. Who would that be?

A. I don't know. Maybe at the present time—I don't know who is down there.

Q. If the foreman wasn't there and Ambrose was there or the other man was there?

A. The nearest man.

Q. And he talked to you?

A. Yes, sir.

Q. What would you say to him?

A. Whatever I wanted.

Q. You would tell him what you wanted to do?

A. Whatever I wanted.

Mr. Carey: No questions.

RAYMOND A. PHELAN sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Where do you live?

A. 110 17th Street, West New York.

Q. Were you connected with the West New York Fire Department on July 16th, 1927?

A. Yes, sir.

Q. What was your position?

A. I am on Headquarters.

Q. As fireman?

A. Yes, sir.

Q. Did you go to this grain elevator at Weehawken on July 16th, 1927?

A. Yes, sir.

Q. About what time?

A. Around half-past ten or eleven o'clock; somewhere around there.

Q. Why did you go there?

A. Well, I believe the chief got a call.

Q. You didn't get the call?

A. No.

Q. You were asked by the acting Chief to go?

A. Yes, sir.

[fol. 54] Q. What did you take with you?

A. Well, we took two gas masks.

Q. Nothing else?

A. No, that's all.

Q. Who was it that asked you to take the gas masks?
A. The acting chief.
Q. What is his name?
A. Charles Danielson.
Q. When you got there, what did you find out about the elevator?
A. Well, there was a man down in the bin.
Q. Where did you go when you got to the elevator?
A. Up to the bin floor.
Q. That is where the top of the bin is?
A. Yes, sir.
Q. Did you look down in this bin 81?
A. No, sir; I just walked over to it and smelt.
Q. What was the condition there; was there any gas around?
A. There was an odor of gas and the doctor claimed it was a very dangerous gas.
Q. As a result of something the doctor said, you kept away?
A. Yes, I walked away.
Q. Then what was the next thing that was done?
A. Then Chief Danielson ordered me to go down in the bin, to don a gas mask and go down.
Q. Who asked you?
A. Charles Danielson.
Q. Ordered you to put a gas mask, and see if you could get the body?
A. Yes, sir.
Q. What did you do?
A. I put the gas mask on and they tied me up with a rope.
Q. Then what?
A. Then I adjusted the gas mask and started to go down.
Q. How far down did you get?
A. I got about ten rungs down, I guess.
Q. What happened when you got ten rungs down with the gas mask on?
A. Well, the air started to go away from me someway and it was getting impure.
[fol. 55] Q. What effect did it have on you?
A. Started to *me* me feel headaches and dizziness.
Q. What did you do then?

A. I got the rope and pulled on the rope and they pulled me up.

Q. So that you had the gas mask on then?

A. Yes, sir.

Q. You experienced these things you told us about and you didn't go down to get the body?

A. No.

Q. What was the next thing that happened?

A. Well, then I came up the ladder and took off the gas mask. I wanted to get some fresh air.

Q. What was the effect of all this stuff that you had been breathing?

A. Well, it made me dizzy and gave me headaches.

Q. Was this bin that you had this experience in the same one that the body was lying at the bottom of?

A. Yes, sir, that was the bin.

Q. How long was it before you came to after you got to the window?

Mr. Carey: I object to that; as to his coming to, I don't know there was any such testimony.

Q. Didn't you swear you went to the window because of the condition you felt yourself in?

A. Yes, I went over to the window to get some fresh air.

Q. How long were you at the window?

A. About five minutes.

Q. After you got the fresh air, did you feel all right?

A. Then I felt better.

Q. Then what did you do?

A. Well, then, we waited around there and then went downstairs.

Q. Then what was done downstairs to get the body out?

A. Well, they took four bolts out of the bottom of the [fol. 56] bin, that is the opening at the bottom of the bin where the grain runs out; they took them out, and took the slide away and they pushed the body up, and brought it out head first.

Q. Did the doctor work over the body?

A. Yes, sir.

Q. What did he work over the body for?

A. Well, he had something, I don't know what you call it, he put on the heart and I believe he injected some serum into the body.

Q. Then afterwards did he pronounce him dead?

A. Well, we went up then; we left there, right before he pronounced him dead.

Q. The body was there when you left?

A. Yes, sir.

Q. What kind of gas mask did you have on; where did you get it?

A. From the chief's car.

Q. Do you know what type it was?

A. No, sir; I do not.

Q. You don't know what make it was?

A. Yes—it is one of the new ones, that is the reason I don't know it.

Q. How did it go, did it just cover your face?

A. Covered my face up tight. It was tied in the back.

Q. Did you ever use this mask before?

A. Not that particular mask.

Q. Masks of the same type?

A. No, I used the army mask before.

Cross-examination by Mr. Carey:

Q. You went into the bin, didn't you?

A. Yes, sir.

Q. And after you got into the bin, you felt the effects of the gas?

A. Yes, sir.

Q. And did you smell gas before you went into the bin? [fol. 57] A. I didn't come that close. I smelled it a little bit as I stood away from the hole.

Q. How near did you get when you smelled it a little bit?

A. Well, about twelve inches away from the bin or so; I just stepped over and smelt.

Q. Up to that time you had not smelled any of the gas odor at all; up to the time you got within twelve inches of the bin and bent over?

A. No, sir.

Q. You had been there about how long when you went to the bin and bent over?

A. Just as soon as I got there, I walked right to the bin.

Q. As you were approaching the bin, you did not discover the odor of the gas?

A. Not to my knowledge, I didn't.

Q. When you went into the bin, how far did you get before you began to feel the effects of the gas?

A. About ten rungs, I guess; that is about ten feet I think. I think they are twelve inches apart.

Q. Then you began to feel the effects of the gas?

A. That is when I felt it. I hit the rope then to bring me up.

Q. You got down about ten feet before you began actually to feel the effects of the gas?

A. Yes, before it came through the mask.

Redirect examination by Mr. Simpson:

Q. Was there anything to see, or just the effect; you could not see any trace of the gas. I mean there was no white clouds or anything of that kind?

A. I didn't look; I just kept on going, because these rungs were slightly slippery; the grain makes them slippery.

Q. You were not watching as you went down the rungs?

A. Yes, sir.

[fol. 58] Q. You were going down the ladder rung by rung?

A. Yes, sir.

Q. And not watching for gas; you say it was slippery?

A. Yes, sir.

Christopher Devitt recalled:

Direct examination by Mr. Simpson:

Q. This gas, cyanide gas, when it is liberated, is it colorless or colorful?

A. Colorless gas.

Q. Is there any way of detecting it by sight at all?

A. No.

Q. How does it liberate itself; how is it liberated from this cyanide, what do they do to liberate it; put it in water or what?

A. Not necessarily; it is liberated by chemical reaction that takes place with the moisture that is in the air.

Q. What does the moisture do?

A. Coming in contact with the calcium cyanide, liberated this hydro cyanide gas.

Q. When it was liberated in this room, would there be any way of telling it was in the room; except the fact of beginning to feel bad, you could not see it?

A. No.

Q. It is invisible?

A. Only from its effect.

CHARLES DANIELSON sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. You were the acting Chief of the West New York Fire Department on July 26th, 1927?

A. Yes, sir.

Q. And you were called to the Weehawken Grain elevator?

A. Yes, sir.

Q. Do you know why you were called?

A. Yes; they called and asked me if I had any gas masks, [fol. 59] that they had a man in the tank. I answered back I would be right there.

Q. What time did you get down there?

A. About 10:15 I should judge.

Q. Fifteen after ten in the morning; how did you get down?

A. Drove down in the car as far as I could, that is, about to pier 11. I had to walk the rest of the way.

Q. Who did you take with you?

A. Fireman Phelan.

Q. What did you find when you got to the elevator?

A. They took me up to the bin floor, as they call it, up the elevator. I had the masks and a searchlight with me. They told me a man was down in the tank and I put on a mask myself and ran over to the tank, and I seen there was a man on the bottom of the tank. I went away and adjusted, or helped to adjust the mask on Fireman Phelan, and put him down the hole to see if it was possible to get the man out. He got down, I should judge about ten feet when he gave me the signal to pull him out.

Q. Did you see the condition of the fireman when you pulled him out?

A. I did. He says he felt sort of sick, dizzy like. I told him to go over to the open window, which he did.

Q. What was the next thing that was done about getting the body out?

A. Why, they decided, as far as I understood, to get him out from the bottom of the tank. They had a few men done some work around the bottom of the tank. I don't know exactly what they did.

Q. Did you go down there?

A. I was on the bottom floor.

Q. Did you see the doctor working on him?

A. Yes, sir.

[fol. 60] Q. How long?

A. As far as I should judge, at least five minutes that I stood there.

Q. It didn't do any good?

A. No, sir.

Q. Then you came away?

A. Yes, sir.

Q. These gas masks you used, what type are they?

A. The one I had on was what they call a Chavey.

Q. How long have you been familiar with their use?

A. I have been in the fire department over 13 years.

Q. Do they keep out gas usually?

A. Yes, sir.

Q. What was the one that the fireman used?

A. That was what we call the regular Army mask.

Q. They keep out gas, ordinary gas?

A. Yes, sir.

Q. Can you explain how it got through the gas mask?

A. No, sir; I could not.

Cross-examination by Mr. Carey:

Q. You don't know what effect these gas masks which you used could have on cyanide gas?

A. No, sir; I do not.

Q. You never had any experience with that gas?

A. No, sir.

Q. Where were you when you put the gas mask on first?

A. I should judge about 15 or 20 feet away from the top of the bin.

Q. Had you been nearer to that, to the top of the bin before you put the gas masks on?

A. No.

Q. Did you notice any odor where you were standing?

A. Yes, I did notice there was a gassy odor in the building.

[fol. 61] Mrs. Antonia Ambrose sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Mrs. Ambrose, your husband was John Ambrose?

A. Yes, sir.

Q. How long had he worked at the Weehawken elevator?

A. About thirty years.

Q. How old was he when he died?

A. 63.

Q. How old are you?

A. 58.

Q. How many children did he leave?

A. Four.

Q. Will you give me the names and how old they are?

A. Joseph is 35; John is 26; William is 19; the girl is 22.

Q. They are all married?

A. The girl and Joseph.

Q. How much money did your husband make?

A. 23.50 a week.

Q. He was living home with you?

A. Yes, sir.

Q. And how many of the children?

A. John and William.

Q. Did he bring this money home to you every week; how much money did he give you every week?

A. He gave me all the money.

Q. What was his nationality, your husband, American or Swiss or German or what?

A. Austrian.

Cross-examination by Mr. Carey:

Q. Did he bring this money to you every week?

A. Yes, sir.

Q. Didn't he keep any for himself?
A. No, he gave it to me, every cent; he gave it to me.
Q. Did you give any back to him?
A. A little, only what he needs.
[fol. 62] Q. Did you give him money to buy his clothes with?
A. Buy clothes himself.
Q. Can you speak a little louder?
A. I can't because I have been sick.
Q. You say he bought his clothes himself?
A. It was in the house to buy clothes.
Q. He lived there, in the family, with you?
A. Yes, sir.

Mr. Simpson: I understand it is admitted by the defendant that on the date of this accident, the Railroad Company operated between Weehawken and other points without the State; that they had in this warehouse grain that had been transported from other States and would be transported from the grain elevator without the State.

Mr. Carey: We admit that. Also that there was grain in the elevator which would be transferred to other points in New Jersey and that some of the trains which were operated by the railroad were operated exclusively within the State of New Jersey.

Mr. Simpson: Do you claim that there was some grain in this elevator that came from the State of New Jersey?

Mr. Carey: No.

M. Simpson: Then the grain all came from outside?

(Plaintiff rests.)

Motion for Nonsuit

Mr. Carey: If your Honor please, I move for a nonsuit, upon the following grounds:

1. At the time and at the times of receiving the injuries resulting in the death of the plaintiff's intestate, he was not engaged in interstate commerce.

[fol. 63] 2. No negligence has been established against the defendant.

3. The negligence alleged in the complaint has not been established against the defendant.

4. At the time of receiving the injuries which resulted in the death of the plaintiff's intestate, he was not acting within the scope of his employment.

5. The injuries which resulted in the death of the plaintiff's intestate arose out of his own negligence.

6. The proximate cause of the death of the plaintiff's intestate was his negligence.

7. The injuries which resulted in the death of the plaintiff's intestate were received at a place where his duty to the defendant did not require him to go.

8. The injuries which resulted in the death of the plaintiff's intestate arose out of disobedience to the orders of the defendant.

9. The injuries to the plaintiff's intestate were recived at a place where he had been forbidden to go by the defendant.

The Court (after argument): Under the circumstances, the motion for a nonsuit will be refused, at least at this time; exception will be allowed the attorney for the defendant on all the points he raised.

Mr. Carey: Exception.

[fol. 64] JOHN BREWER recalled for the defendant.

Direct examination by Mr. Carey:

Q. On the morning of this accident, did you call Mr. Ambrose to do anything?

A. Saturday morning, no, sir.

Q. Did you call him or anybody else to open the bin or do anything in connection with bin 81?

A. No, sir.

Q. Do you know where this grain came from that was run through bin 81?

A. The part of the country, or the part of the elevator where it was shipped from?

Q. No, I mean from what part in the elevator?

A. From bin 208.

Q. What kind of a bin is that?

A. It is a storage bin.

Q. Now, where was this grain put after it was drawn off from bin 81?

A. Bin 81, was put into bin 94.

Q. Did this movement of grain which passed through bin 81 and which was treated with this preparation; did this movement from Tuesday morning to Friday afternoon have anything to do with the transportation of that grain to its point of destination?

A. No, sir.

Q. Or transportation anywheres else?

A. No, sir.

Q. What was the purpose of that movement?

A. For the Cyanide people to experiment and use the grain so that they could put their bugs into it and then experiment with the cyanide.

Q. Just for the purpose of experiment?

A. Experimental purposes.

Q. At whose request?

A. At the request of Mr. Shanahan the superintendent.

[fol. 65] Cross-examination by Mr. Simpson:

Q. How many weighers were working up there this morning with you?

A. The day the grain was put in, three and the Chief Weigher.

Q. Would they all talk through this tube down below?

A. To the main floor, yes, sir.

Q. Did they have anything to do with the bin floor?

A. To the bin floor or the bottom floor.

Q. What time did you get to work that morning?

A. Eight o'clock.

Q. Were you going to use this bin any more, this bin 81?

A. Not that I know of, unless we used it for some other stuff.

Q. I mean on the morning of the death of this man; you say there was four of you there?

A. The morning of the death of the man?

Q. Yes.
A. Nothing.
Q. What is the name of the others?
A. There was myself and three others.
Q. What were their name?
A. Walters and Gallagher.
Q. Were they under you or over you?
A Both graded the same.
Q If you had a message for downstairs and Dillworth was not there, who took the message?
A. Whoever I talked to, took the message.
Q. You have already told us that if you could not get the foreman, you would get one of the other men and tell him?
A. We said whatever we wanted to be done; maybe to have a trolley set to put the grain through.
Q. Had Ambrose often done that?
A. I don't know if he set any trolleys alone.
Q. Did you ever talk to Ambrose yourself?
A. Very seldom I would give him a message.
[fol. 66] Q. How many times did you give him orders?
A. I never gave him a message more than once.
Q. What orders did you give him?
A. Any orders that I gave, I would request him to do whatever I wanted; I would select the bin.
Q. You would telephone down, and you would give them the message; all you say you did was to telephone down?
A. No, sir.
Q. Did you give your orders to anybody that answered from that floor that day?
A. No, sir.
Q. What makes you remember so clearly that on the 16th of July, 1927, you did not give any orders on that day?
A. I gave no orders at all on the 16th of July.
Q. What makes you remember that?
A. Because I remember I was called downstairs that day. I just happened to be on the floor after weighing some cars.
Q. Where?
A. Out in the yard.
Q. Did the cars come right into your room?
A. They come in on the track floor.
Q. What is the track floor?
A. The bottom floor.

Q. That is your floor?
A. No, sir.
Q. How do they get through to you?
A. Through the elevator.
Q. Don't the cars go on the elevator?
A. No, they come to the bottom floor and they are weighed. Then it is sent to the bins. There are 268 storage bins and 23 shipping bins.
Q. 268 bins where grain was stored and 23 shipping bins?
A. Yes, sir.
Q. And this grain is assigned to these bins?
A. Yes, sir.

Redirect examination by Mr. Carey:

Q. As far as you know, did anyone from your floor call [fol. 67] for the opening of bin 81 on the morning of this accident?
A. No, sir; nobody.

Mr. Simpson: I move to strike that out, as far as he knows. That is negative and valueless, and I move that it be stricken out as incompetent.

Q. When you were there on that floor with the other weighers, who would usually call?
A. Whoever happened to be working on the job. Whoever has the order, maybe we run an order or run a trolley, whoever calls up the ground floor or calls up the floor below, and he selects the bin.
Q. Who selects the bin where the stuff is to be put?
A. The chief weigher.
Q. What does Mr. Shanahan have to do with that?
A. He has nothing to do with the storing of grain. That is all left to the Chief Weigher.
Q. And he has the selection of the bins? A. Yes, sir.

William J. Dillworth, recalled by defendant:

Direct examination by Mr. Carey:

Q. Mr. Dillworth, were you working on the bin floor from Tuesday afternoon when this grain was put in bin 81 to Saturday morning after the accident happened?

A. Yes, sir.

Q. There every day?

A. Yes, sir.

Q. During that time, were you affected in any way by gas on the bin floor?

A. No, sir; not until Saturday morning.

Q. How and under what circumstances were you affected?

A. When I looked into the bin. I was with Ambrose [fol. 68] down there and looked in the bin and I had a sort of headache.

Q. That was the only time you were affected by gas?

A. Yes, sir.

Q. Did you open bin 81 on the morning of the accident?

A. No, sir.

Q. Did you see anybody open it?

A. No, sir.

Q. Who else was working on that floor besides you and Ambrose?

A. Fitzpatrick.

Q. That is all the men who were working there that morning?

A. That is all; just three.

Q. Did you say anything to Ambrose about the character of the gas that had been used, or the character of the product that had been used in this experiment?

A. Yes, I told him it was poison.

Q. When did you tell him that?

A. That was Tuesday when they were putting it in.

Q. Did you say anything about it afterwards?

A. Well, now and then we would talk about it as we passed and got a smell of it.

Cross-examination by Mr. Simpson:

Q. There was no gas used on your floor?

A. The bin was on that floor.

Q. There was no gas on your floor?

A. Down some sixty feet.

Q. Down at the bottom of that bin?

A. Yes, sir.

Q. When was the last time you saw this man alive?

A. I judge about nine o'clock in the morning.

Q. Do you know what time it was?

A. I don't know the exact time.

Q. What time was it you heard the noise?

A. Between a quarter to ten and ten o'clock.

Q. So for three-quarters of an hour you had not seen him?

A. No, sir.

[fol. 69] Q. You were in the shanty?

A. Yes, sir.

Q. How did people get up to your floor?

A. By the elevator or by the stairway.

Q. So that there were two ways that you got in, by the stairs or by the elevator?

A. Yes, sir.

Q. You stayed in your shanty there until a quarter to ten o'clock; is that right?

A. Yes, sir.

Q. You say that when you wanted to look for the body, you began to get a headache; how did you look for the body?

A. When I looked down the hole.

Q. Did you stand up on the floor and look into the hole or did you go down the ladder?

A. I didn't go down the ladder; I stayed on the floor.

Q. You stayed on the floor and bent your head?

A. Yes, sir.

Q. Then you bent down and put your head over the hole?

A. Yes, sir.

Q. Then you smelt this smell?

A. Yes, sir.

Q. Were you trying to get the smell or trying to see the body?

A. I was trying to see the body.

Q. How far down did the ladder go, how many rungs down?

A. Maybe to four or five feet from the bottom of the bin.

Q. Was there any entrance to that bin except on your floor?

A. No, sir.

Redirect examination by Mr. Carey:

Q. Did you open that bin on Saturday morning?

A. No, sir.

Q. Did you drop a light in the bin that Saturday morning?

A. No, sir.

Q. Did anyone from the weighing floor call for bin 81 that morning?

A. No, sir.

[fol. 70] Recross-examination by Mr. Simpson:

Q. You said you didn't open the bin. These weighers say that when you were not there, they would give orders to the men. You say you are the only one to give orders to the men; do you know anything about that?

A. When I was on the floor; if I go downstairs for something——

Q. If you happened to go down stairs, who would they give orders to?

A. Whoever answered the bell.

JOHN E. FITZPATRICK recalled by defendant.

Direct examination by Mr. Carey:

Q. Did you work on the bin floor on Tuesday, Wednesday, Thursday, Friday and Saturday?

A. Yes, sir.

Q. With the man who was killed?

A. Yes, sir.

Q. Every day?

A. Yes, sir.

Q. Were you at any time affected by the gas from bin 81? A. No, sir.

Q. Did you open bin 81?

A. No, sir.

Q. Any of the covers on Saturday mornings?

A. No, sir.

Q. Did you see anybody opening any of the covers on bin 81?

A. No, sir.

Q. Did you drop a light into bin 81?

A. No, sir.

Q. Did you see anybody doing that?

A. No, sir.

Q. So far as you know, did anyone call, any one from the weighers' floor call for the opening of bin 81 on Saturday morning?

A. No, sir.

Q. No one said anything to you about opening it?

A. No, sir.

Cross-examination by Mr. Simpson:

Q. Did the weighers ever say anything to you about opening bins?

A. No, sir.

[fol. 71] Q. Never; you know that?

A. I only worked there two weeks.

Q. Were you there when the foreman was away downstairs and they called Ambrose to the tube and they told him to open a bin?

A. Not to my recollection.

Q. You say you didn't smell any gas there?

A. No, sir.

Q. You haven't any sense of smell?

A. No, sir.

Q. You didn't expect to smell any?

A. No, sir.

(Both sides rest.)

MOTION TO STRIKE

Mr. Carey: I now move to strike out the evidence in this case with respect to the can which was exhibited here and the contents thereof and the analyses, on the ground that it has not in any way been connected with the experiment which was performed in connection with this grain. Its connection with that is not established by any evidence whatever; and the fact that it was in the custody of a man who went there and got it on the morning of the accident, under the circumstances testified to, does not in any way connect it with the treatment of this grain which was used for the experiment in question.

The Court (after argument): Well, the chemists' testimony as to the properties of this kind of gas and the doctor's testimony as to this kind of gas being found in the

place, and the testimony relative to this kind of gas coming in contact with human beings, that will remain. Your motion is only with respect to such part as related to this particular can itself.

Mr. Carey: And the contents which are said to have been taken from it and analyzed by the chemist.

[fol. 72] The Court: Yes; that will be stricken out, with an exception to Mr. Simpson.

Mr. Simpson: Exception.

Mr. Carey: I now make a motion for a direction of verdict, on the same grounds urged in my motion for nonsuit.

The Court: The motion will be denied.

Mr. Carey: Exception.

The Court: You may have an exception.

(Counsel summed up to the jury.)

CHARGE TO JURY

The Court then charged the jury as follows:

The Court: Gentlemen of the jury: This is an action brought and being maintained by Antonia Ambrose, as Administratrix of the Estate of John Ambrose, Senior, deceased, against the New York Central Railroad Company, a corporation.

It is brought for the purpose of recovering damages under what we know as the "Death Act," for the death of John Ambrose, Senior.

The action is brought under what we commonly call in the law the "Federal Employers Liability Act." That part of the Act in question which may be of value or service to you is as follows: the Act provides

"Every common carrier by railroad engaged in interstate commerce,"

that is, commerce between the several States of the Union, and so forth,

"shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal

[fol. 73] representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

In actions of this character and in this action, gentlemen of the jury, there are several matters which require your attention and your determination upon the evidence as you find it, and under the law as it is applicable to the issues as raised in this case. I shall endeavor to give them to you in what appears to me to be the order in which you would naturally consider and determine them.

Therefore, you will understand that just because of the fact that I give them, or place before you the several issues in a certain order and in a certain manner, so far as one relates to the other, is no reason of course that you should consider them in that manner. If consideration of them in another order is more satisfactory to you, then it justifies your doing so. All that I can do is that which in my judgment best lays before you and most clearly lays before you the issues you have to determine.

First and foremost, it is necessary that the plaintiff shall establish and must have established by a fair preponderance of the evidence those facts and conditions which gave [fol. 74] her a right of action under the statute in question, because she is depending and maintaining her action entirely upon the right which she alleges her intestate, that is her husband, had and she in turn as his administratrix has, under this Federal Act.

Therefore, I say it is necessary and proper for you to determine whether or not the plaintiff has, by a fair preponderance of the evidence, established a right to the use of this Act in question.

Under this Act, that is the Federal Employers Liability Act, and in order to have the benefit of an action under this act, it must appear that the defendant Company at the time complained of was engaged in interstate commerce;

and it likewise is necessary that it appear by the same degree of evidence that the intestate himself was at the time of the occurrence complained of, engaged in interstate commerce. And unless both of these things appear, and are shown by the plaintiff by a fair preponderance of the evidence, this plaintiff has no right of action under the act in question.

So for that reason, I am first presenting that point to you for your consideration, because if you find that she has not established these things which she must establish in order to have the benefit of this statute, then of course you would not go any further, and your deliberations and the case must end there.

As I have suggested, the first and important question for your decision then, is whether or not the plaintiff has satisfied you by a fair preponderance of the evidence that at the time of the happening of this accident the defendant Company was engaged in interstate commerce from the facts which appear indisputably in this action. It is for you to [fol. 75] say whether or not they were so engaged at this time. So that brings you down, narrows down your inquiry to the question as to whether or not the husband of the plaintiff in this suit, at the time of the happening was engaged in interstate commerce. That is a situation also for you to determine from all the evidence in the case, as to just what the plaintiff's intestate was doing at the time of this accident.

Now, the question has been raised here and the contention is that this plaintiff's intestate at the time of this accident, was not engaged in his employer's duty at all, but that he was doing something which he had been forbidden to do, something which he had been warned against doing. You are to take that into consideration from all the facts and all the circumstances in this case, and you are to say if, at the time of the happening of the accident, the intestate was engaged in and about the duty which he owed to the master, the defendant Company, with respect to interstate commerce, or had he removed himself from that employment, had he taken himself out of that relation that had existed as between him and the defendant Railroad Company, so that he was not at the time of the happening in question engaged in any act which he was called upon, as the servant of the defendant Company, to perform in relation to and

with respect to the interstate commerce of the defendant Company.

Of course, Gentlemen, if you find the fact to be that this intestate had a direction or order that he should remain away from this particular place, specifically remain away, and that he was doing something which he had been specifically ordered not to do, then he would be outside the [fol. 76] scope of his employment and could not recover.

If you find, Gentlemen, that those facts which give to this woman as administratrix of her husband a right of action under the rules which I have given you, and under the evidence, have been established, your consideration of the issues does not stop there, because another question immediately presents itself to you, and that is, was the accident to the plaintiff's intestate, that is her husband, caused as the proximate result of any negligence on the part of the defendant Railroad Company, as charged by the plaintiff in her complaint.

So that, Gentlemen, you take up first of all, and you have got to find in this case that it is governed by this Act which we speak of as the Federal Employers Liability Act. If you find that, then you go to the next question: was this accident caused by the negligence of the defendant Company, and whether or not that negligence was the proximate cause of the accident.

Now, it was the duty of this defendant Company to use reasonable care to supply workmen who were working in its employ reasonably safe places for the employees to work, and then for you to say whether or not under all the circumstances, after having heard all of the evidence in the case, whether or not under the circumstances as you find them from the evidence in this case to have been on the day in question, this defendant Company complied with the duty which the law placed upon it, and did it use reasonable care to supply a safe place for the workman to be. And if they did not, if you find that they were negligent in doing that, then you come to the question of whether or not that negli- [fol. 77] gence was the proximate, that is the main, moving cause of this accident.

Now, Gentlemen of the Jury, if you find after applying the rule, that this defendant Company was negligent and that negligence was the proximate cause of the accident, and the cause of this injury and the death of this intestate,

then this plaintiff would be entitled to recover and you would come next to the question of the measure of damages.

There is another question which I am going to take up with you later, but I think it proper to put it after the question of damages, because it is a question which even if you find it to be present in the case, could only be used to minimize the measure of damages, and that is the question of contributory negligence.

You have heard in a great many cases during this last week, cases brought under the State Act, in negligence cases where the Court, where contributory negligence is alleged, has charged you that would bar a recovery. I call your attention now to the fact, so that you will not get confused, that under the act under which this case is being tried, contributory negligence is not an absolute bar to recovery, but it can only be taken into consideration in diminution of damages if you find it to exist at all. So I am leaving that to follow after the question of damages, because, as I said to you, if you find it to exist it cannot, as it does under the State law, absolutely defeat recovery, but can be used, if at all, only to diminish damages.

If this woman is entitled to a verdict, then it will be necessary for you to know for what she is entitled to recover. As I indicated to you at the opening, this is an action [fol. 78] brought under the Death Act. It is not necessary for me to read to you this statute, but let it suffice for me to say to you, that without that statute which I have indicated and called the Death Act, there could not be any recovery for death in the State of New Jersey prior to the passage of this Act. So you are to be guided and must be entirely guided, and explicitly guided, in the determination of the amount of any verdict, if there is to be one for the plaintiff, by what that act says a verdict may be had for; and I know, Gentlemen, that to what I am about to say to you, you will give your very best attention, because it is important that you should have this rule of the statute, as well as what our courts have said upon it, firmly impressed in your minds.

The statute says the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed between such widow and next of kin in the proportion pro-

vided by law in relation to the distribution of personal property left by persons dying intestate.

"In every such action the jury must give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person."

"What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss"—money loss—"which falls upon the widow and next of kin by the premature takin-off of the intestate" —that is, the husband and father in this case—"That fund is ascertained by taking into account all the possiblities. The intestate,"—that is, the husband and father, in this [fol. 79] case—"might have died by the course of nature shortly after the accident."

He might have become sick, incapacitated, unable to work any longer. The widow herself might have died shortly afterwards, the next of kin might all have died shortly afterwards.

"The damages are to be determined by reference to the pecuniary injury resulting to the widow and next of kin of the deceased by his death. The injury to be thus recovered for has been defined to be the deprivation of a reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation is therefore, the sole measure of damages."

"Nothing is to be added for loss of society or wounded feelings, or anything else which can not be measured by money and satisfied by pecuniary recompense."

In other words, what the plaintiff says in this case is that; had not this casualty taken place, had not my husband been killed, that I would have been entitled during his lifetime and during my lifetime and during the lifetime of my children;—that in all reasonable probability he would have earned money, and in like probability, he would have contributed from his earnings to my support and to the benefit of the next of kin, that because of this accident, he met his death, and therefore his ability to earn and likewise his

ability to contribute to myself and to the next of kin, has been cut off.

That is what she asks and claims, and what the law says the widow and next of kin are entitled to have in such a situation is that sum of money which represents in reasonable probability those sums which the father, had he lived, [fol. 80] would during his lifetime, and that of the widow and the children, have contributed to their support and maintenance and for their benefit. Not the gross sum that you would find, if any, that he would have so contributed had he lived, and during their periods of life, but that gross sum that you would find, capitalized, as the courts have said, or reduced to its present worth, that lesser sum than the whole loss which is the present worth of the total loss; because you see, Gentlemen, the reason for that is this: that had the intestate continued to live and continued to earn, and continued to contribute to his wife and family, he would have earned week by week, or month by month, as the manner of payment of wages was, and he would naturally have contributed as he earned; so that had he lived during the lifetime of his widow and next of kin, whatever contributions, if any, were made by him, would have been made in those periodical payments or contributions running over the entire period when the contributions would have continued.

Now, by your verdict you are satisfying for all loss, both that which has accrued as well as that which in reasonable probability under the evidence would have accrued at this time; and, therefore, they should not have the total sum, but that lesser sum which is the present worth of the total loss.

Now, you will remember the testimony; that this man was 63 years of age; that his wife was 58 years of age. You will remember that at the time of his death he was making $23.50 a week.

You will take these things into consideration and determine as a capital fund, if you come to the question of damages and award any damages, what sum will represent the [fol. 81] present value of this loss to his widow and next of kin, taking into consideration his age, and the age of the widow, and the age of the children, and the amount of money which he was making at the time.

Now, gentlemen of the jury, I have given you the rule for the measurement of damages as if the plaintiff were entitled thereto without any deduction. But in this action, the defendant raises as one of its defenses the defense of contributory negligence. That is, the defendant says that even though you, gentlemen of the jury, find from the facts and under the law, that the intestate met his death as the proximate result of some negligence upon the part of the defendant company, yet the defendant says the intestate was himself guilty of negligence which contributed to the happening which caused his death. The burden of satisfying you of that, gentlemen of the jury, rests upon the defendant, because that is a defense urged by it, and it must satisfy you by a preponderance of the evidence of such facts as stated, that the intestate himself was guilty of negligence which contributed to the happening.

Now, there is a rule of law which applies and did apply to this intestate, and that is, that he was bound to use that care which a reasonably prudent person would or should have used and exercised, time, place and circumstances and conditions considered, so that he would not bring harm to himself. I have given you now the degree of care which the plaintiff's intestate was himself required to use.

Under this present Act, gentlemen of the jury, the law is to the effect that even though, under the provisions of this Act, it should appear that the employee himslef may [fol. 82] have been guilty of contributory negligence, that shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Now, I think, gentlemen of the jury, that practically covers the situation as I find it.

First of all, the plaintiff in this case says that through the negligence of this defendant, the plaintiff's intestate met his death. The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence, in order to have a recovery, first, that both employee and employer were at the time of the accident employed in interstate commerce, in order to bring it under this Act. If they are engaged in interstate commerce, then the plaintiff must satisfy you by a preponderance of the evidence that the accident was caused through the negligence of the defend-

ant, and that that negligence was the proximate cause of the injury.

Now, if they have done that, then the plaintiff is entitled to a recovery, and entitled to recover in such sum as I have outlined to you that this Act provides. There is no provision here for sympathy, or for sorrow, or for loss of society, but it is for just exactly as I have described it to you, under the Act itself.

The defendant sets up in this case an absolute denial of any liability, because they say they were not negligent. If that is so, there is no recovery, because that is an absolute defense. The defendant further says that at the time the plaintiff's intestate was not engaged in interstate commerce. If you find that, there would be no recovery under the Act under which this suit is brought.

The defendant further says that at the time of the ac- [fol. 83] cident that the plaintiff's intestate was doing something which he had been forbidden to do, and which was outside of the scope of his employment. If you find that to be so, there would be no recovery because she, the plaintiff, could not then recover under the provisions of this Act.

The defendant further says, that even if it was negligent, and that negligence was the proximate cause of the accident, nevertheless the intestate himself, the husband of the woman bringing this suit, was guilty of contributory negligence. If you find that to be so, you are to diminish the amount of your verdict by such proportion as you find that the plaintiff's intestate's contributory negligence bears to the negligence of the defendant.

I think that practically covers the whole case as I recall it.

I have been requested by the defendant to charge a number of requests.

DEFENDANT'S REQUESTED INSTRUCTIONS

1. If at the time of receiving the injuries resulting in the death of plaintiff's intestate, he was not engaged in interstate commerce, plaintiff cannot recover. I so charge you.

2. Unless some definite act of negligence alleged in the complaint has been established against the defendant, plaintiff cannot recover. I so charge you.

3. If the proximate cause of the death of plaintiff's intestate was his negligence, plaintiff cannot recover. I so charge you.

4. I refuse to charge except as already charged.

5. I refuse to charge except as already charged.

6. I refuse to charge except as already charged.

[fol. 84] 7. Whether plaintiff's intestate was engaged in interstate commerce depends upon what he was doing at the time of the accident. I so charge you.

You may take the case and retire.

(Jury retired.)

Mr. Carey: I except to your Honor's submitting to the jury the question of negligence on the part of the defendant.

Also, I except to the submission to the jury of the question of the plaintiff's intestate having been engaged in interstate commerce at the time of the injury complained of.

Also, an exception to the refusal of the Court to charge the requests refused except as the Court charges in its general charge.

The Court: You may have exceptions.

DEFENDANT'S REQUESTS NOT CHARGED

1. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover.

5. If the injuries which resulted in the death of plaintiff's intestate arose out of disobedience to the orders of defendant, plaintiff cannot recover.

6. If the injuries to plaintiff's intestate were received at a place where he had been forbidden to go by defendant, plaintiff cannot recover.

[fol. 85] In Circuit Court of Hudson County

Action at Law

Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., Deceased, Plaintiff,

v.

New York Central Railroad Co., Defendant

Rule for Final Judgment—Filed May 11, 1928

This case was tried before Hon. Frank L. Cleary, Judge, and a jury, at the Hudson County Circuit Court, on May 10, 1928.

Evidence having been adduced by both parties hereto, the jury considered same, and returned a verdict in favor of the plaintiff, Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., deceased, and against the defendant New York Central Railroad Company, a corporation, and assessed the damages in the sum of Six Thousand and Three Hundred ($6,300.00) Dollars.

It is therefore ordered and adjudged that the plaintiff Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., deceased, have and recover from the defendant New York Central Railroad Company, a corporation, the sum of Six Thousand Three Hundred ($6,300.00) Dollars, together with costs, and, it is further ordered and adjudged that judgment final be, and is hereby entered, in favor of the plaintiff Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., deceased, and against the [fol. 86] New York Central Railroad Company, a corporation.

Frank L. Cleary, Judge.

In Circuit Court of Hudson County

Judgment

Judgment on Verdict in the above entitled cause was entered in this Court on the 11th day of May in the year of

our Lord One Thousand Nine Hundred and Twenty-eight, in favor of the Plaintiff Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., deceased, and against the defendant New York Central Railroad Company, a corporation, in a plea of Action at Law, for the sum of Six Thousand Three Hundred ($6,300.00) Dollars, and costs to be taxed.

Judgment entered and signed this 11th day of May, 1928.
John J. McGovern, Clerk.

[fol. 87] In Circuit Court of Hudson County

[Title omitted]

Rule to Show Cause—Filed May 15, 1928

Application having been made for this rule within six days after the rendering of the verdict herein,

It is, on this 14th day of May, 1928, ordered that the plaintiff herein show cause before this Court on the 25th day of May, 1928, at ten o'clock in the forenoon (daylight saving time) at the Court House in Jersey City, why the verdict herein should not be set aside and a new trial granted on the ground that said verdict is excessive.

And it is further ordered that all objections noted at the trial on behalf of the defendant be and the same hereby are reserved as grounds of appeal.

Frank L. Cleary, Circuit Court Judge.

[fol. 88] In Circuit Court of Hudson County

[Title omitted]

Extension of Time for Filing Recognizance on Appeal—Filed May 28, 1928

Judgment having been entered in the above entitled cause on May 11th, 1928, in favor of the plaintiff and against the defendant herein for the sum of $6,300, besides costs, and

defendant having taken a rule to show cause why the verdict herein should not be set aside on the ground that the same is excessive, and the time for entering into and filing a recognizance to stay execution on said judgment in case of an appeal therefrom being about to expire.

It is on this 25th day of May, 1928, Ordered that the time for filing recognizance by and on behalf of defendant to stay execution in case an appeal shall be taken from said judgment, be and the same is hereby extended to June 4th, 1928, and proceedings by way of execution on said judgment is hereby stayed until that date.

Frank L. Cleary, Circuit Court Judge.

[fol. 89] In Circuit Court of Hudson County

[Title omitted]

Extension of Time for Filing Recognizance on Appeal—Filed June 4, 1928

Defendant's rule to show cause not having yet been disposed of,

It is on this 4th day of June, 1928, ordered that the time for filing recognizance by and on behalf of defendant to stay execution in case an appeal should be taken from said judgment be and the same is hereby extended to June 9th, 1928, and proceedings by way of execution on said judgment are hereby stayed until that day.

Frank L. Cleary, Circuit Court Judge.

[fol. 90] In Circuit Court of Hudson County

[Title omitted]

Order Discharging Rule to Show Cause—Filed June 8, 1928

A rule to show cause having been entered in this cause on the 14th day of May, 1928, and this cause having been argued by Alexander Simpson, Counsel for the Plaintiff,

and Wall, Haight, Carey & Hartpence, Counsels for the Defendant, and the Court having considered the same and finding no cause for making the rule absolute.

It is thereupon, on this 8th day of June, 1928, on motion of Alexander Simpson, Ordered, that the said rule to show cause be and the same is hereby dismissed with costs, and the judgment is hereby confirmed.

Frank L. Cleary, Judge.

[fol. 91] In Circuit Court of Hudson County

[Title omitted]

Notice of Appeal—Filed May 15, 1928

To Alexander Simpson, Esq., Attorney for Plaintiff:

Take notice, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in the Circuit Court of Hudson County in the above stated cause.

Dated June 8, 1928.

Wall, Haight, Carey & Hartpence, Attorneys for Defendant.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 8th day of June, 1928.

Alex Simpson, Attorney for Plaintiff.

[fol. 92] In Circuit Court of Hudson County

Recognizance—Filed June 8, 1928

Recognizance on appeal in this action in the sum of $12,800, duly entered into before George G. Tennant, Supreme Court Commissioner, by the defendant-appellant, New York Central Railroad Company, as Principal, and National Surety Company, as Surety, in favor of the plaintiff-respondent, was filed herein June 8, 1928.

In Court of Errors and Appeals of New Jersey

Action at Law

Antonia Ambrose, Administratrix, etc., of John Ambrose, Deceased, Plaintiff-Respondent,

v.

New York Central Railroad Company, a Corporation, Defendant-Appellant

Grounds of Appeal—Filed June 29, 1928

The appellant states the following grounds of appeal:

1. The Court overruled the following question to the witness William J. Dillworth:

"Q. Was there any reason at all for his going into that bin?"

2. The Court overruled defendant's motion for judgment of nonsuit.

[fol. 93] 3. The Court overruled defendant's motion to direct a verdict in its favor.

4. The Court erroneously charged the jury as follows:

"As I have suggested, the first and important question for your decision then, is whether or not the plaintiff has satisfied you by a fair preponderance of the evidence that at the time of the happening of this accident the defendant company was engaged in interstate commerce from the facts which appear indisputably in this action. It is for you to say whether or not they were so engaged at this time. So that brings you down, narrows down your inquiry to the question as to whether or not the husband of the plaintiff in this suit, at the time of the happening was engaged in interstate commerce. That is a situation also for you to determine from all the evidence in the case as to just what the plaintiff's intestate was doing at the time of this accident."

5. The Court erroneously charged the jury as follows:

"Now, Gentlemen of the Jury, if you find after applying the rule, that this defendant Company was negligent and

Exhibit P-2

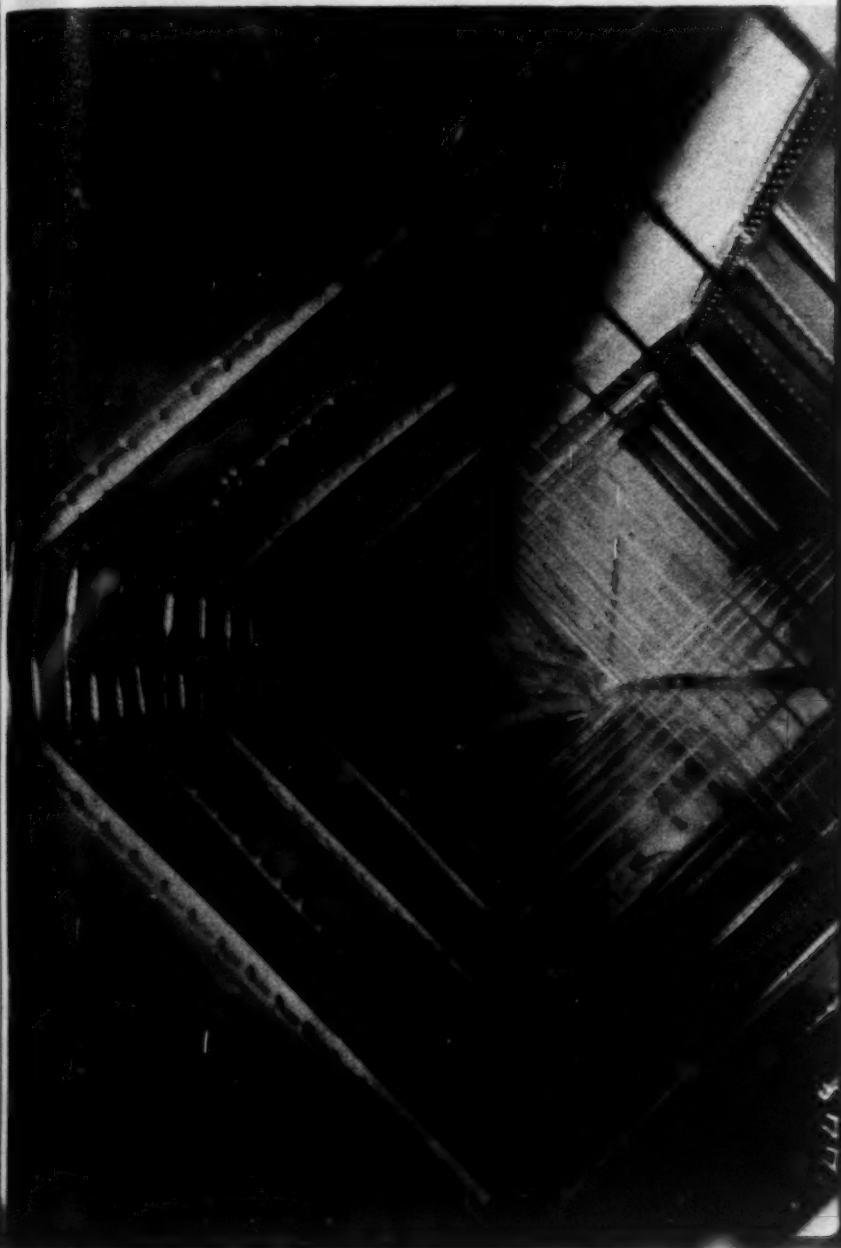

Exhibit P-3.

that negligence was the proximate cause of the accident, and the cause of his injury and the death of this intestate, then this plaintiff would be entitled to recover and you would come next to the question of the measure of damages."

6. The Court refused defendant's request to charge the jury as follows:

[fol. 94] "4. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover."

7. The Court refused defendant's request to charge the jury as follows:

"5. If the injuries which resulted in the death of plaintiff's intestate arose out of disobedience to the orders of defendant, plaintiff cannot recover."

8. The Court refused defendant's request to charge the jury as follows:

"6. If the injuries to plaintiff's intestate were received at a place where he had been forbidden to go by defendant, plaintiff cannot recover."

Wall, Haight, Carey & Hartpence, Attorneys for Defendant-Appellant.

(Here follow Exhibits P-2 and P-3, side folio pages 95 & 96 and 97 & 98)

[fol. 99] In Court of Errors and Appeals of New Jersey, October Term, 1928

No. 85

Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., Deceased, Plaintiff-Respondent,

v.

New York Central Railroad Company, Defendant-Appellant

Appeal from Hudson County Circuit Court

Opinion—Filed Feb. 4, 1929

The Judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division, which renders any opinion by the Court impossible.

For defendant-appellant, Wall, Haight, Carey & Hartpence.

For plaintiff-respondent, Alexander Simpson.

This was a suit in the Hudson County Circuit Court in an action at law to recover damages for the death of the plaintiff's decedent, which was caused by the happening of an accident. Plaintiff had judgment, and defendant appeals to this Court.

Per Curiam:

The judgment under review herein is affirmed by an equally divided Court.

[File endorsement omitted.]

[fol. 100] Form C-248. Doc. No. 8024

IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

No. 85 of October Term, 1928

[Title omitted]

VOTE OF THE COURT—Filed Feb. 4, 1929

Date, Feb. 4, 1929.

The Chancellor presiding.
No opinion.

Check list	Affirm	Reverse
The Chancellor	..	1
" Chief Justice	..	1
Mr. Justice Trenchard	1	..
" " Parker	..	1
" " Katzenbach	1	..
" " Campbell	..	1
" " Lloyd	1	..
Judge Van Buskirk	1	..
" McGlennon	1	..
" Kays	..	1
" Hetfield	..	1
" Dear	1	..
Totals	6	6

[File endorsement omitted.]

[fol. 101] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

ANTONIA AMBROSE, Administratrix, etc., of John Ambrose, Deceased, Plaintiff-Respondent,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, Defendant-Appellant

On Appeal from Hudson County Circuit Court

ORDER ON AFFIRMANCE OF JUDGMENT—Filed Feb. 4, 1929

This cause having been duly argued at the October Term, 1928, of this Court by Alexander Simpson, of counsel for

the respondent, and Wall, Haight, Carey & Hartpence, of counsel for the appellant, and the Court having considered the same, and finding no error in the record or proceedings in the Hudson County Circuit Court,

It is thereupon, on this fourth day of February in the year of our Lord one thousand nine hundred and twenty-nine, ordered and adjudged that the judgment of the Hudson County Circuit Court, in this cause, be affirmed with costs; and that the record be remitted to the Hudson County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Alex. Simpson.

A true copy. Joseph F. S. Fitzpatrick, Clerk.

[File endorsement omitted.]

[fol. 102] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 27, 1929

The petition herein for a writ of certiorari to the Circuit Court of Hudson County, State of New Jersey, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,172. New Jersey Circuit Court of Hudson County. Term No. 73. New York Central Railroad Company, petitioner, vs. Antonia Ambrose, as administratrix of the estate of John Ambrose, deceased. Petition for writ of certiorari and exhibit thereto. Filed April 29th, 1929. File No. 34,172.

FILE COPY

Office Supreme Court, U.S.
FILED
APR 29 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. [redacted] 73

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Hudson County, New Jersey

ALBERT C. WALL,
JOHN A. HARTPENCE,
Counsel for Petitioner.

E. W. TRAVER, Law Printer, 154 Nassau St., N. Y. (Tel. Beekman 2726)

IN THE

Supreme Court of the United States

OCTOBER TERM 1928

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

PLEASE TAKE NOTICE that we have filed in the Supreme Court of the United States a petition for a Writ of Certiorari in this cause and a brief in support thereof; also a copy of the record herein. Copies of said petition, brief and record are herewith served upon you. Pursuant to the provision of the rules of said Supreme Court, said petition, brief and record will be submitted to said Court on the first motion day following the expiration of twenty days after service of this notice upon you.

Dated, Jersey City, N. J., April 22, 1929.

ALBERT C. WALL,
JOHN A. HARTPENCE,
Counsel for Petitioner.

To:

ALEXANDER SIMPSON, Esq.,
Counsel for Respondent:

Due service of the foregoing notice and a copy of the petition, record and brief therein mentioned is hereby acknowledged this day of April, 1929.

.....
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1928

No.....

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HUDSON COUNTY, NEW JERSEY

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The New York Central Railroad Company, the petitioner herein, respectfully represents:

1. This action was brought in the Circuit Court of Hudson County, New Jersey, under the Federal Employers' Liability Act by the respondent (plaintiff below) against petitioner (defendant below) to recover damages for the death of John Ambrose, deceased, respondent's intestate.

2. The complaint alleges that the intestate was employed by petitioner in interstate commerce at its grain elevator at Weehawken, New Jersey; that petitioner negligently and without warning to decedent used in the elevator certain poisonous gases where intestate was at work by which he was overcome and caused to fall into a shaft and was killed (Record, page 2, line 10). The "shaft," so-called, is bin 81 in petitioner's elevator.

3. The answer denies the alleged negligence, denies that at the time of the accident deceased was engaged in interstate commerce, and alleges as a separate defence that decedent's injuries and death were caused by his negligence, and his disobedience of petitioner's orders in going to the place where he received the injuries when to his knowledge it was obviously dangerous so to do (Record, page 3, line 30).

4. On May 11, 1928, respondent recovered judgment in said Hudson County Circuit Court for $6,428.60 damages and costs (Record, page 86).

5. Petitioner appealed from said judgment to the New Jersey Court of Errors and Appeals in the last resort in all causes, and that Court, on February 4, 1929, affirmed said judgment by an equally divided Court, six members voting to affirm, and six members voting to reverse. By reason of the equal division of said Court, no opinion was delivered (Record, page 98).

6. On February 14, 1929, pursuant to the order of said Court of Errors and Appeals, the record with the order of affirmance of said judgment was remitted to the Circuit Court of Hudson County, New Jersey, where it now remains.

The Matters Involved

7. The questions presented on this application are:

(a) Was negligence proved against petitioner?

(b) At the time of the accident, was respondent's intestate engaged in interstate commerce?

(c) Was the death of decedent due to his own negligence and his disobedience of petitioner's orders?

(d) Did the evidence warrant submitting to the jury the questions (1) of petitioner's negligence; (2) of decedent's negligence?

Summary of Facts

8. Petitioner is a common carrier engaged in both interstate and intrastate commerce. It operates a grain elevator at Weehawken, New Jersey, where it receives interstate shipment of grain transported over its railroad lines, both for storage and for further transportation. Some of the grain is shipped from said elevator to points outside of the State of New Jersey and some to points within that State.

9. The elevator is several stories high. One of the floors is called "the bin floor." Its dimensions are about 300 feet by 130 feet (Record, page 35, line 15).

10. In this elevator there are 291 bins; 268 are storage bins and 23 are shipping bins (Record,

page 66, line 32). The accident happened in bin 81. All grain is shipped out of the elevator from the shipping bins. The "bin floor" is of concrete and covers the tops of all the bins. The storage bins extend from that floor downward to a depth of about 85 feet. In the concrete floor covering these bins are round spout holes, 17 inches in diameter, into which are inserted grain spouts which carry the grain into the bins. One or more of these spout holes opens into each bin.

Over each bin there is also a rectangular manhole 20 inches by 16¾ inches through which, when necessary, entrance to the bins is had. The spout holes and manholes are covered by metal covers, the edges of which rest on shoulders or flanges in the concrete floor. These metal covers when in place are level with the surface of the floor.

Exhibit P. 3 (Record, page 97) is a photograph of a portion of the bin floor, including the part over storage bin 81, and showing spout holes and the manhole over that bin.

Exhibit P. 2 (Record, page 95) is a photograph of the interior of bin 81, taken from the top looking down. The iron bars across one corner of the bin constitute a ladder for entering the bin when necessary.

11. Respondent's intestate was employed as a "floorman" on the bin floor. His duties were to sweep that floor, and when called upon, to assist in setting the trolleys for running grain into the bins (Record, page 6, line 15). A co-employee, John E. Fitzpatrick, worked with and performed the same duties on this floor as decedent (Record, page 12, line 5). William J. Dillworth was foreman of the floor (Record, page 5, line 16). These were the only employees working on that floor (Record, page 14, line 24; page 68, line 12).

12. On July 16, 1927, shortly before 10 A. M. respondent's intestate was discovered dead in the bottom of storage bin 81. There was no eye-witness to the accident which resulted in his death. No one knows when, under what circumstances, or why he entered the bin. There was no reason for his entering it and he did so against petitioner's orders.

13. So far as known the circumstances leading up to the accident were as follows: On Tuesday, July 12, 1927, Mr. Shanahan, the Superintendent of the elevator, was approached by a Mr. Hubbel, representing the Air Reduction Company, who requested the use of a bin in the elevator to experiment with a preparation for exterminating boll weevil in grain. The experiment consisted of mingling a powder with the grain as it was run through the spouts into the bin. When in the bin the heat and moisture of the grain acting on the powder produced a gas which permeated the grain, and was said to kill the weevil. Mr. Hubbell had been performing this experiment in various elevators around New York Harbor. Mr. Shanahan, not having instructions from his superior to permit the experiment, asked Mr. Hubbell if he had secured permission to make the experiment in that elevator. He eventually satisfied Mr. Shanahan that he had permission and promised to produce letters to that effect from petitioner, and Mr. Shanahan then consented to the experiment (Record, page 25, line 20; page 27, line 18). The promised letter of authority, however, was never produced, and petitioner in fact never consented to the experiment (Record, page 27, line 20). Shanahan had no authority to permit the experiment (Record, page 35, line 25).

14. In the afternoon of Tuesday, July 12, 1927, a quantity of grain was run from storage bin 208 through spouts into bin 81 (Record, page 64, line 15). The powder was mingled with the grain as it passed through the spouts. This was done on the floor above the bin floor (Record, page 25, line 33; page 27, line 25). When so used the powder was entirely harmless. The gas developed therefrom after the grain was in the bin was poisonous. There being no weevil in this grain, forty small bags about two inches in length containing weevil were dropped at intervals by the experimenter into the grain as it was passing through the spout (Record, page 26, line 20; page 28, line 24).

15. After running the grain into bin 81, the openings over that bin were closed (Record, page 28, line 15). The grain was allowed to remain there seventy-two hours until Friday afternoon, July 16. In the meantime, work was carried on as usual on the bin floor by decedent and the two other employees of that floor without any injury or any inconvenience from the gas, or any indication that the gas was present except on the two occasions hereinafter mentioned, when one or more of the covers of the bin were removed (Record, page 67, line 30; page 70, line 20). Dillworth told decedent to keep away from the bin; that "he would not trust the stuff," and that it was poisonous (Record, page 16, line 30; page 17, line 36; page 68, line 15).

16. On Friday afternoon, July 15, under the direction of Mr. Hubbell, the grain was drawn out of bin 81 from the bottom and returned to storage bin 94 (Record, page 28, line 38; page 64, line 15). The weevil bags were recovered as the

grain was drawn off. One bag was missing. Dillworth was directed to see if he could locate this bag. He removed a cover from the top of the bin, dropped an electric light bulb attached to a cord into the bin to illuminate the interior and discovered the missing bag caught at the intersection of cross rods "five or six rungs from the bottom." When Dillworth looked into the bin and discovered the bag, decedent was with him, and looked into the bin at the same time. A cover from the bin being removed, there was quite a strong odor of gas noticeable when they were at the opening looking into the bin (Record, page 16, line 18; page 17, line 28).

17. On the morning of July 16, the three employees, Dillworth, decedent and Fitzpatrick, went to work on the bin floor about eight o'clock as usual. The covers were all on bin 81 (Record, page 18, line 12; page 23, line 23). Dillworth went down to the first floor of the elevator some time after nine o'clock. When he returned to the bin floor about 20 minutes before the accident he passed bin 81, and all the covers were then on (Record, page 12, line 25). He went into his shanty (on the bin floor) and about twenty minutes afterward heard the sound of something falling. He left his shanty and discovered that the cover of the manhole and the cover of one of the spout holes of bin 81 were off. Through the spout hole an electric drop light was hanging down into the bin, the bulb being near the bottom, and on looking into the bin he discovered the body of decedent at the bottom (Record, page 13, line 38; page 51, line 14). The last time Dillworth saw decedent alive was about nine o'clock on that

morning and he was then sweeping the floor. The next time he saw him he was at the bottom of the bin (Record, page 8, line 1). The first time Dillworth had noticed any of the covers off the openings of the bin on Saturday morning was after he heard the noise of decedent's fall (Record, page 18, line 12).

18. The only time employees went into these bins was when in drawing off the grain it became clogged so that all of it did not flow out. Under such circumstances, one of the sweepers would be directed to go into the bin and clean out the clogged grain (Record, page 6, line 28; page 7, line 32). On this occasion there was no clogging of the grain in bin 81 (Record, page 17, line 12).

19. The floormen were forbidden to enter the bins unless ordered so to do by the foreman of the floor or the superintendent of the elevator (Record, page 15, line 35; page 30, line 28). Dillworth gave decedent no instructions to go into the bin on Friday or Saturday, and did not know he was going into the bin (Record, page 16, line 35). Shanahan, the Superintendent of the elevator, was not present on the day of the accident. He left for Buffalo on Friday afternoon (Record, page 29, line 5). Brewer, the weigher, did not call decedent to do anything on Saturday morning, nor did he call for anything to be done in connection with bin 81 (Record, page 64, line 5). On Saturday morning, neither Dillworth nor Fitzpatrick removed any of the covers from bin 81, nor did they see anyone remove any of these covers, or drop the electric light into the bin. No one saw the accident or saw decedent just prior thereto (Record, page 69, line 32; page 70, line 28).

20. The movement and treatment of the grain was solely for experimental purposes made at the request and for the benefit of Mr. Hubbell, and was never consented to by petitioner (Record, page 25, line 20; page 27, line 18; page 35, line 22). There were no weevil in the grain except what was placed in it by Mr. Hubbell for the experiment. No treatment of the grain was necessary to fit it for further shipment (Record, page 28, line 25). It was wholly unnecessary to remove the little bag of weevil from the bin (Record, page 29, line 15).

Reasons Relied on for Allowance of the Writ

1. The State Court of New Jersey has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court, to wit:

(a) The State Court erroneously decided that the evidence warranted a finding of negligence on the part of petitioner.

(b) The State Court erroneously decided that the evidence warranted a finding that at the time of the accident decedent was engaged in interstate commerce.

(c) The State Court erroneously decided that the evidence warranted a finding that decedent's death was not due to his own negligence.

To this petition is annexed a supporting brief and with it is presented a certified transcript of the record and proceedings in the Hudson County Circuit Court and in the New Jersey Court of Errors and Appeals.

Wherefore petitioner prays that a writ of certiorari may be issued to the Circuit Court of Hudson County of New Jersey where the record herein is now lodged, requiring that Court to certify said record and judgment to this Court to the end that the errors complained of may here be reviewed and corrected.

Dated April 15, 1929.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner.

By ALBERT C. WALL,
JOHN A. HARTPENCE,
Its Attorneys.

IN THE

Supreme Court of the United States

OCTOBER TERM 1928

No.....

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

v.

ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION

Point I

No negligence was established against petitioner.

1. The mere use of the poisonous gas, produced after the grain was in the bin, was in no way dangerous, and hence was not negligent.

The fact that it was not dangerous is incontrovertibly established by the fact that after the grain had been treated and run into bin 81, petitioner's employees, including decedent, carried on their usual work on the bin floor in the usual manner from Tuesday afternoon until Saturday morn-

ing at about 9:45 o'clock—more than three and a half days—without being in the slightest degree affected by the gas, so long as the openings of the bin were kept closed.

2. Only when the cover was removed and a person stood or bent over the opening, was the gas noticeable, and then the effect, though apparent, was not serious, as is evidenced by the effect on Dillworth and decedent when they were looking through the opening for the missing bag on Friday afternoon.

3. Neither Dillworth nor Fitzpatrick, the only employees other than decedent on the bin floor, opened the bin on Saturday morning, or saw it open. Hence, petitioner did no act which rendered the place of work unsafe.

4. Under the Federal Employers' Liability Act, negligence must be established against defendant, otherwise there can be no recovery. *Seaboard Air Line R. Co.* v. *Horten,* 233 U. S., p. 492; *Missouri Pacific R. R. Co.* v. *Aeby,* 275 U. S. 426 (at p. 429); *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170 (at p. 172).

5. This case is brought under the Federal Employers' Liability Act and is governed by that act and by the principles of the common law as applied in the Courts of the United States. *Missouri Pacific R. R. Co.* v. *Aeby,* 275 U. S. p. 426 (at p. 429); *Toledo St. Louis & Western R. Co.* v. *Allen,* 276 U. S., p. 165 (at p. 169 bottom).

6. This Court will examine the record and if found as a matter of law that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of death, the judgment of

the State Court will be reversed. *Chicago M. & St. P. R. Co.* v. *Coogan,* 271 U. S., p. 472 (at p. 474), and cases cited in that opinion.

7. There was no eye witness to the accident. The evidence wholly fails to disclose how it happened. The record leaves the whole matter in the realm of speculation and conjecture. This is insufficient to sustain the judgment. *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan,* 271 U. S. 472 (at p. 478) and cases cited.

8. Not only did the respondent fail to fix negligence upon petitioner, but the evidence affirmatively demonstrated that it had been guilty of no negligence. Hence, petitioner was entitled to a judgment of non-suit, and at the close of the case to a directed verdict.

9. Where there is but a mere *scintilla* of evidence, the State Court, in actions brought under the Federal Employers' Liability Act, is required to follow the rule established in the Federal Courts and order a non-suit, or direct a verdict for defendant.

Baltimore & Ohio R. Co. v. *Groeger,* 266 U. S. p. 521;

Gulf M. & N. R. Co. v. *Wells,* 275 U. S. p. 455;

Toledo St. Louis & Western R. Co. v. *Allen,* 276 U. S. p. 165;

Western & Atlantic R. R. Co. v. *Hughes,* Admrx., decided by this Court February 18, 1929, 73 U. S. Law Ed., Advanced Opinions, March 1, 1929, page 268.

Point II

At the time of the accident decedent was not engaged in interstate commerce.

Whether in sweeping the floor of the "bin floor" decedent was engaged in interstate commerce is immaterial. That employment did not require him either to uncover bin 81 or enter it. That he did remove the cover from the spout hole, drop the electric light into the bin, remove the manhole and enter the bin is the only logical conclusion from the evidence . Both these covers were in place when decedent went to work the morning of the accident. Neither of the other two employees on that floor removed these covers or dropped the electric light into the bin. That these covers were removed and the light dropped into the bin immediately preceding the accident was undisputed. No one but decedent could have done this. That he entered the bin voluntarily seems beyond dispute. That in sweeping in the vicinity of the bin or even over the covers, he could accidentally have removed the covers and have been thereby overcome by gas and fallen into the bin is beyond belief. The fact that the cover of a spout hole and the cover of the manhole had been removed, and that the electric drop light had been dropped into the bin through one of these openings renders any theory of the accidental removal of these covers impossible of belief. In this connection it will be noted from Exhibit P. 3 (Record, page 97) that the round spout holes and the oblong manhole were a considerable distance apart. Furthermore, decedent had been warned of the poisonous nature of the gas and had been directed to keep away from the bin.

All of these facts and circumstances show conclusively that decedent had abandoned his employment in interstate commerce, had departed from the duties required of him and had voluntarily and unnecessarily entered into a place of danger where his duty did not call him and from which his orders required him to keep away.

If it be suggested that he entered the bin for the purpose of removing the little bag of weevil, respondent's case is not aided for there was no necessity whatever to remove this bag from the bin.

In *Erie R. R. Co.* v. *Welsh,* 242 U. S. 303, this Court said (page 306):

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois C. R. R. Co.* v. *Behrens,* 233 U. S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C 163, 10 N. C. C. 153."

To the same effect is *Minneapolis & St. Louis R. R. Co.* v. *Winters,* 242 U. S. 353.

In *Krysiak* v. *Penn. R. R. Co.,* 270 Fed. 758 (C. C. A. Third Circuit), plaintiff's intestate had been employed in interstate commerce during the day and in leaving his place of employment to go home, chose a dangerous way instead of the safe way provided by his employers. While using that way he was injured.

The Court said (page 760):

> "At that moment, we think, Krysiak ended his employment and lost the status of an em-

> ployé in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

Tested by the rule laid down in the foregoing cases, at the time of the accident decedent was not engaged in interstate commerce or in any duty pertaining to his employment, and petitioner was not liable for the injury sustained.

Point III

Decedent's injuries and death were due to his own negligence.

For three and a half days decedent had worked in safety and without inconvenience on the bin floor. Had he obeyed orders and not uncovered the bin and attempted to enter it, as he undoubtedly did, the accident would not have happened.

We respectfully submit that for the reasons stated the writ of certiorari should issue.

ALBERT C. WALL,
JOHN A. HARTPENCE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 73

NEW YORK CENTRAL RAILROAD COMPANY,
PETITIONER,

vs.

ANTONIA AMBROSE, AS ADMINISTRATRIX OF THE ESTATE OF JOHN AMBROSE, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI.

BRIEF FOR PETITIONER.

ALBERT C. WALL,
JOHN A. HARTPENCE,
Counsel for Petitioner.

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ON WRIT OF CERTIORARI.

BRIEF FOR PETITIONER.

On May 6th, 1928, the respondent recovered judgment against petitioner in the Circuit Court of Hudson County, New Jersey, and the Court of Errors and Appeals, the highest Court of that State, affirmed the judgment on February 4th, 1929, solely by reason of

the equal division of that Court, six Judges voting to affirm and six to reverse. Because of the equal division of the appellate court no opinion was possible (R., p. 80, fol. 99 to p. 82, fol. 102; N. J. Advance Reports, Vol. 7, p. 347).

Upon affirmance of the judgment the record was remitted to the trial court. Petitioner filed its petition in this Court for a writ of certiorari on April 29th, 1929, and the writ was granted May 27th, 1929 (R., p. 82, fol. 103).

This action was brought under the Federal Employers' Liability Act to recover damages for the death of John Ambrose, Senior, respondent's intestate. His death was caused by an accident in a grain elevator operated by petitioner at Weehawken, New Jersey.

Petitioner is a common carrier, and as such it is engaged in interstate and intrastate commerce. It transported to the elevator in question, over railroads operated by it, shipments of grain, all of which originated outside the State of New Jersey. Some of the grain brought to the elevator was stored in storage bins and thereafter shipped to points outside the State of New Jersey, and some (a very small part) to points within that State (R., p. 55, fol. 62).

The Issue.

The charge against petitioner is that, without warning or notice to decedent, petitioner negligently and carelessly used certain poisonous gases in the elevator where decedent was employed; that while he was there engaged in interstate commerce he was overcome by

these gases, was thereby caused to fall into a shaft, and was killed (R., p. 1, fol. 2).

(The "shaft," so called in the complaint, is grain bin No. 81 in petitioner's elevator, in which decedent's dead body was found.)

Petitioner denies that at the time of the accident decedent was engaged in interstate commerce; denies the negligence complained of and alleges that decedent's injuries were occasioned by his negligence and his violation of petitioner's orders in going to the place where the accident happened, when it was obviously dangerous so to do (R., p. 2, fol. 3).

Errors Relied On.

At the close of plaintiff's case defendant moved for a nonsuit, and at the close of the entire case moved for a directed verdict in its favor. The trial court erroneously overruled both motions (R., p. 55, fols. 62-63; p. 64, fol. 72). These errors were stated as grounds of appeal (R., p. 78).

The motions so erroneously overruled were in part based upon the following grounds:

1. That at the time of the accident decedent was not engaged in interstate commerce.

2. That no negligence had been established against petitioner.

3. That the injuries resulting in decedent's death arose out of his own negligence.

4. That at the time of the accident decedent was not acting within the scope of his employment.

5. That decedent's injuries arose out of his disobedience of petitioner's orders.

(R., p. 55, fols. 62 and 63; p. 64, fol. 72.)

In this Court petitioner relies on these errors as grounds for reversal.

Grounds of Jurisdiction of This Court.

1. The Court of Errors and Appeals of New Jersey has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court, to wit:

(*a*) The State Court erroneously decided that the evidence warranted a finding of negligence on the part of petitioner.

(*b*) The State Court erroneously decided that the evidence warranted a finding that at the time of the accident decedent was engaged in interstate commerce.

(*c*) The State Court erroneously decided that the evidence warranted a finding that decedent's death was not due to his own negligence.

2. Among the cases sustaining the jurisdiction of this Court, are:

Missouri Pacific R. R. Co. vs. Aeby, 275 *U. S.,* p. 426.

Toledo, St. Louis & Western R. Co. vs. Allen, 276 *U. S.,* p. 165.

Chicago, M. & St. P. R. Co. vs. Coogan, 271 *U. S.,* p. 472.

Gulf, M. & N. R. Co. vs. Wells, 275 *U. S.,* p. 455.

Summary of Facts.

Decedent had been employed by petitioner in its elevator at Weehawken for more than six years (R., p. 4, fol. 6). He worked on the "bin floor," a cement floor 300 feet long by 130 feet wide (R., p. 31, fol. 35). This floor covers the tops of the 291 grain bins in the elevator, of which 268 are storage bins and 23 are shipping bins (R., p. 59, fol. 66). In this floor are circular openings 17 inches in diameter into which are inserted the grain spouts or trollies which carry the grain into the bins. Access to these bins, when necessary, is had through rectangular manholes, 20 inches by 16¾ inches in size (R., p. 45, fols. 50-51). These manholes are located at the corners of the bins and across these corners are bolted iron bars which serve as the rungs of ladders reaching from the top to the bottom of the bins. These openings into the bins are covered with metal covers, which, when in place, rest on shoulders or flanges in the cement floor, and are level with the floor.

Exhibit P-2 (R. opposite p. 78) is a photographic view looking down from an opening in the bin floor into bin 81, where decedent's body was found.

Exhibit P-3 (R. opposite p. 79) is a photograph of a portion of the bin floor including the part which covers bin 81. This photograph shows the three circular spout holes of that bin with the covers removed, and the rectangular manhole with its cover on.

Bin 81 is about 85 feet deep (R., p. 9, fol. 11).

The grain is drawn out of the bin from an opening in the bottom (R., p. 7, fol. 9).

Dillworth was the foreman in charge of the bin floor (R., p. 4, fol. 5).

In general, decedent's duties were to sweep the floor and assist in setting spouts for the transfer of grain into the bins (R., p. 5, fol. 6; p. 17, fol. 20) and to do such other "floor work" as might be assigned to him by his foreman (R., p. 18, fol. 21). There were times when the grain would become clogged in the bins when it was being drawn off so that all of it would not run out. When that happened one of the sweepers would be sent into the bin by the foreman, or by order from the office, to clean it out. At the same time another man at the opening on the bin floor would lower a drop light into the bin and manipulate it so that the man in the bin could see to do the work. Only when the grain became clogged in the bins did the sweepers go in to clean them out, and then they were allowed to go in only when ordered to do so (R., p. 5, fol. 6; p. 13, fols. 15-16; p. 27, fol. 30; p. 28, fol. 31). The majority of the bins were self cleaning, and it very rarely happened that men were sent in to clean them (R., p. 30, fol. 34).

The pertinent events leading up to the accident are as follows:

On Tuesday, July 12, 1927, a Mr. Hubbell, representing the Air Reduction Sales Corporation, requested of Mr. Shanahan, the superintendent of the elevator, the use of a bin in the elevator with some grain to experiment with a preparation for the extermination of insects (particularly boll weevil) in grain (R., p.

22, fol. 25). The proposed experiment consisted of mingling a powder with the grain as it was run through the grain spouts into the bin. When in the bin the moisture in the grain coming in contact with the powder produced a gas which permeated the grain and was said to kill the weevil (R., p. 24, fol. 27).

Not having received any instructions from his superior, Shanahan asked if Hubbell had permission to make the experiment. Being informed by Hubbell that he had experimented in other elevators and receiving Hubbell's promise that he could and would procure letters from petitioner authorizing the experiment, Shanahan permitted Hubbell to proceed. Hubbell never produced the promised letter, and petitioner never in fact consented to the experiment (R., p. 22, fol. 25; p. 24, fol. 27).

Although Shanahan had full charge of the ordinary business operations of the elevator, he had no authority to authorize experiments by outside parties for their own purposes (R., p. 21, fol. 24; p. 31, fol. 35).

The grain experimented with was taken from storage bin 208 and run into storage bin 81 (R., p. 12, fol. 15; p. 56, fol. 64). As the grain passed through the spouts the powder was mingled with it (R., p. 24, fol. 27). There were no weevil in this grain and for the purpose of the experiment 40 small bags containing weevil were dropped at intervals into the grain as it passed into the bin (R., p. 23, fol. 26). This operation was completed on Tuesday afternoon, July 12 (R., p. 23, fol. 26; p. 25, fol. 28). The openings to the bin were covered, but the covers were not sealed (R., p. 24, fol. 27).

The treatment of this grain was solely for the purpose of the experiment and was not at all for preparing it for shipment. It needed no preparation, for there were no weevil in the grain except those put in by Hubbell for the experiment (R., p. 25, fol. 28; p. 57, fol. 64).

On Friday afternoon, after the grain had been in the bin 72 hours, it was drawn off from the bottom of the bin (R., p. 7, fol. 9; p. 18, fol. 20). As it was drawn off, the bags containing weevil were recovered for examination to ascertain the result of the experiment. One of the 40 bags was missing and Dillworth, the forman of the bin floor, was asked to open the bin and look for the bag. He removed one of the covers, lowered a droplight into the bin and looking through the opening discovered the bag lodged at a crossing of tie rods, about 5 or 6 rungs of the ladder from the bottom of the bin (R., p. 13, fol. 16; p. 17, fols. 19 and 20; p. 26, fol. 29). When Dillworth looked for the bag Ambrose, the decedent, was with him, and also looked into the bin. As Dillworth was bending over the opening looking for the bag he noticed an odor of gas. He told decedent to keep away from the bin as much as possible—not to hang around it; that he would not trust the stuff (meaning the gas), and that the gas was poisonous (R., p. 14, fol. 16; p. 15, fol. 17; p. 16, fol. 19; p. 60, fol. 68; p. 61, fol. 69). Neither Dillworth nor decedent was materially affected by gas in thus opening and examining the bin.

On Saturday morning, July 16, at about 8 o'clock, Dillworth, Fitzpatrick, and decedent went to work as

usual on the bin floor (R., pp. 20-21, fol. 23). These three were the only persons working on that floor that day (R., p. 12, fol. 14; p. 60, fol. 68). At that time all the covers were on the openings of bin 81 (R., p. 15, fol. 18). Fitzpatrick and decedent went to sweeping the floor. When decedent was last seen alive by either Dillworth or Fitzpatrick, he was sweeping. Fitzpatrick was working about 100 feet from bin 81 when he last saw decedent (R., p. 6, fol. 8; p. 19, fols. 21-22).

Dillworth went from his "shanty" on the bin floor to the first floor. When he returned to the bin floor all the covers were on bin 81 (R., p. 10, fol. 12). He went into his shanty and in about twenty minutes or more he heard a noise as of "something hitting." He went outside his shanty and saw that the cover of one of the spoutholes and the cover of the manhole of bin 81 were off, and that the cord of an electric droplight was hanging through the spouthole. He went to the bin, looked in, and saw decedent's body at the bottom. This was between 9:45 and 10 o'clock (R., p. 6, fol. 8 to p. 7, fol. 9; p. 8, fol. 10 to p. 10, fol. 12; p. 11, fol. 13 to p. 12, fol. 15; p. 44, fol. 50).

There was no stoppage or clogging of grain in bin 81; it ran out clean. There was nothing in the bin except the little bag of weevil. It was not necessary to remove it, and neither Hubbell nor petitioner desired its removal. Nothing was ever done to remove it. (R., p. 14, fol. 17; p. 15, fols. 17-18; p. 18, fol. 20; p. 26, fol. 29; p. 27, fol. 31).

Neither Dillworth nor Fitzpatrick removed the covers from bin 81 or lowered the droplight into that bin on the morning of the accident. They, with decedent, were all the workmen on the bin floor. Decedent was the only one who could have done this (R., p. 12, fol. 14; p. 60, fol. 68; p. 61, fol. 69; p. 62, fol. 70).

Dillworth did not direct decedent to enter the bin and did not know he was going to enter it (R., p. 14, fol. 16). On the contrary, as already pointed out, the undisputed evidence is that Dillworth repeatedly warned decedent to keep away from the bin, because the gas was dangerous.

On the morning of the accident no one requested or directed decedent or anyone else to do anything whatsoever with respect to bin 81. That bin was neither used nor intended to be used for any purpose on that day (R., p. 56, fol. 64; p. 57, fol. 65; p. 59, fol. 67; p. 63, fol. 70).

Dillworth, Fitzpatrick, and decedent, the only workmen employed on the bin floor, worked on that floor every day from Tuesday afternoon until the accident happened, about 9:45 o'clock Saturday morning—more than 3½ days—without being affected or inconvenienced at all by the gas except on Friday afternoon, when Dillworth removed one of the covers from bin 81 and bent over the opening looking for the missing bag (R., p. 61, fol. 69). Then he noticed an odor of gas and had a "sort of headache" (R., pp. 59-60, fol. 67; p. 62, fol. 70).

On Saturday morning, Dillworth first noticed that the covers were off bin 81 after he heard the noise as

of "something hitting." He had given no orders to remove these covers (R., p. 16, fol. 18). Immediately after that he discovered decedent's body in the bin.

Point I.

No Negligence Was Established Against Petitioner.

1. Petitioner did not authorize the experiment in which poisonous gas was used.

Hubbell deceived Shanahan and induced him to believe that petitioner had authorized or would approve the experiment. This was untrue.

While it appears that Shanahan was superintendent of the elevator and was in full charge of its ordinary business operations, there is no evidence that his authority extended to permitting experiments of the character performed by Hubbell, which had no relation whatever to petitioner's business, and Shanahan disclaims any such authority (R., p. 31, fol. 35). The grain was not infected, and without special authority he had no more right to permit such an experiment than he had to sell the elevator.

Not having authorized the experiment, petitioner is not liable for any results flowing therefrom.

2. Even if petitioner be held responsible for permitting the experiment, there was no negligence. The powder which was mingled with the grain harmed no one. The gas which was generated in the bin was equally harmless so long as the bin remained covered. This is demonstrated by the undisputed fact that the

three men who worked on the bin floor, of whom decedent was one, performed their usual work on that floor from the time the grain treated with the powder was run into the bin, on Tuesday afternoon, until 9:45 a. m. on Saturday, more than 3½ days, without the slightest injury or inconvenience from the gas (R., pp. 59-60, fols. 67 and 68; p. 62, fol. 70). Decedent was perfectly safe in the performance of his work so long as the bin was kept closed. On Friday afternoon, after the grain had been run out of the bin, Dillworth, looking for the missing bag, had removed a cover and he and decedent had both looked into the bin. Dillworth certainly, and doubtless decedent, when looking for the bag, had bent over the opening (R., p. 61, fol. 69). While the odor of the gas was quite noticeable, the effect upon them was slight (R., p. 60, fols. 67-68).

What had changed decedent's situation from one of entire safety to one of danger? Nothing but the removal of the covers from a spouthole, and from the manhole of bin 81, and doubtless decedent's entry into the bin. But the removal of the covers was not the act of petitioner, for neither Dillworth nor Fitzpatrick removed them, nor saw anyone remove them (R., p. 60, fol. 68; p. 61, fol. 69; p. 62, fol. 70). Twenty minutes before the accident both these covers were on (R., p. 10, fol. 12). These two men and decedent were the only persons employed on the floor at the time (R., p. 12, fol. 14; p. 60, fol. 68). Entering the bin was not only his voluntary act, but was wholly unnecessary, contrary to orders, and in spite of repeated warning (R., p. 13, fols. 15-16; p. 27, fol. 30; p. 14, fol. 16; p. 16,

fol. 19; p. 60, fol. 68). Petitioner did nothing to endanger decedent or render his place of work unsafe.

It is no answer to say, as was urged in the state courts, that these covers *might* have been displaced while decedent was sweeping over them, or that he *might* have been overcome by the gas while attempting to adjust them. The reasoning in support of each of these suggestions involves a presumption upon a presumption, which is not permissible. Where circumstantial evidence is relied upon, the circumstances must be proved, they cannot be presumed. *Price vs. N. Y. Central*, 92 N. J. Law at p. 432; *Manning vs. John Hancock Mutual Life Ins. Co.*, 100 U. S. at p. 697; *Chicago, &c., R. R. Co. vs. Coogan*, 271 U. S. at p. 477. True, in sweeping the floor, the men swept right over the manhole covers (R., p. 19, fol. 21). But there is no evidence that decedent was sweeping *over the covers* of bin 81 just prior to the accident. The fact that the sweepers at times swept over the manhole covers does not warrant a presumption that decedent swept over these particular covers on the morning of the accident. The suggestion that he did is mere conjecture, for no one saw what he was doing after about 9 o'clock (R., p. 6, fol. 8; p. 60, fol. 68). Even if the evidence warranted a presumption that decedent swept over these covers on the morning of the accident, it is not permissible to base on that presumption the further presumption that in so doing the covers were displaced, nor would it be permissible to draw from those two presumptions (if they existed) a third presumption that the cover being thus displaced, decedent was

overcome by escaping gas and was caused to fall into the bin. Had he been overcome while sweeping, he would have fallen on the floor. It is inconceivable that he would have fallen in such position as to pass through a spouthole only 17 inches in diameter or a manhole only 16¾ by 20 inches (R., p. 45, fols. 50-51).

There is no evidence whatever that either of these covers had become accidentally displaced. On the contrary, both were in place about 20 minutes before the accident (R., p. 10, fol. 12). There being no evidence of the accidental displacement of the covers, there can be no presumption that decedent was overcome while attempting to replace them. But the evidence absolutely negatives every one of the suggested presumptions. Photograph Ex. P-3 (opposite R. p. 69) shows how these covers are set into the cement floor and rest on shoulders so that they are level with the floor. It is apparent that it would be impossible to displace them from their position by sweeping over them. Add to this the undisputed facts that a droplight had been lowered into the bin; that neither of decedent's coworkers on that floor had displaced the covers or lowered the droplight, and the conclusion is irresistible that decedent himself had removed the covers, lowered the droplight, and entered the bin, and thereby had caused the accident, which otherwise would not have occurred (R., p. 60, fol. 68; p. 61, fol. 69; p. 62, fol. 70). Putting the case as strongly as possible for respondent, this conclusion is at least quite as probable as any suggested by respondent. In that posture of the case the judgment should be reversed.

Alvino vs. Public Service Ry. Co., 97 N. J. Law at p. 527.

There was no need for decedent to remove the covers from the bin or to enter it. There was no clogging of the grain in the bin; all ran out. The bin was entirely empty save for a little bag of weevil (R., p. 6, fol. 7; p. 14, fol. 17; p. 18, fol. 20). It was wholly unnecessary to remove this little bag. It is no way interfered with the use of the bin and neither Shanahan nor Hubbell desired its removal (R., p. 15, fol. 17; p. 26, fol. 29).

The rule of the floor was that none of the workmen should enter the bins unless ordered to do so by the foreman of the floor or the superintendent (R., p. 13, fols. 15-16; p. 27, fol. 30). Dillworth, the foreman, had not ordered decedent to enter the bin (R., p. 14, fol. 16). On the contrary, he had specifically ordered him to keep away from it and had warned him that the gas was poisonous (R., p. 14, fol. 16; p. 16, fol. 19; p. 60, fol. 68). In entering the bin without orders from his superior he violated the rule of the floor and the express order to keep away from the bin. He also disregarded the warning that the gas was poisonous.

3. There was no eyewitness to the accident; the evidence fails to disclose how it happened. What place he fell from, what he was doing at the time, and what caused him to fall are all left in the realm of speculation and conjecture. Speculation and conjecture cannot sustain the judgment. *Chicago, Milwaukee & St. Paul R. Co. vs. Coogan*, 271 U. S. 472 (at p. 478), and cases cited.

In *McCombe vs. Public Service Railway Company,* 95 N. J. Law 187 (N. J. Court of Errors and Appeals), an action was brought to recover for the death of one Saunders, plaintiff's intestate. His body was found lying on the defendant's track near midnight. He had suffered injuries from which he died. The motorman on the car following the one supposed to have injured the decedent discovered the body lying on the rail of defendant's track. One leg and one arm had been cut off, and the body was otherwise mangled. "There were no eyewitnesses to the accident. No one saw how it happened." The court held that the facts proved did not warrant a presumption of negligence on the part of the defendant and said (p. 189):

> "But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price v. New York Central R. R. Co.,* 92 Id. 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence."

In *Adriance vs. Palisade Realty and Amusement Company, et als.,* 95 N. J. Law 185 (N. J. Court of Errors and Appeals), the plaintiff was riding in a "racer" operated by the Amusement Company within the boundaries of its park. With him in the car were two companions. An iron bar was placed in front of them and fastened to the car. Toward the end of the

second ride something happened and plaintiff ceased to remember anything. One of his companions spoke to him a few minutes before the accident. The next he saw was that "the plaintiff was doubled up, bleeding." Not one of the party saw the plaintiff struck or saw how he was injured. The Court said (p. 186):

> "The facts disclose an injury which is admitted, but do not disclose how it happened and no one gave any testimony on the point."

The Court also held that the maxim *res ipsa loquitur* was not applicable. On page 187 the Court used the following language:

> "If there is no proof of any fact by which the conduct of the defendant can be ascertained, there is nothing for a jury to pass upon. *Bahr v. Lombard, Ayres & Co., supra.*
>
> "The only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price v. New York Central R. R. Co.*, 92 N. J. Law 429."

In *Alvino vs. Public Service Railway Company*, 97 N. J. Law 526, suit was brought to recover for the death of plaintiff's intestate arising out of a collision between a motorcycle and defendant's trolley car. No one testified to having seen or heard any collision. Decedent's wife testified that she saw him riding in the side car of the motorcycle. About a half hour later she heard of his injury. There was testimony to the effect that a motorcycle was found badly broken and two men were found unconscious on the roadside. The Court said (p. 529):

> "It may fairly be said from this testimony an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car; but, if so, how it happened or who was responsible for the collision is left entirely to conjecture. The record is silent on these essential points."

To the same effect see:

Olsen v. Erie R. R. Co., 99 N. J. Law 485.

Patton v. Public Service Ry. Co., 227 Fed. 810 (C. C. A., 3d Circuit), at p. 812.

4. Under the Federal Employers' Liability Act, negligence must be established against defendant, otherwise there can be no recovery. *Seaboard Air Line R. Co. vs. Horten*, 233 U. S., p. 492; *Missouri Pacific R. R. Co. vs. Aeby*, 275 U. S. 426 (at p. 429); *Erie R. R. Co. vs. Winfield*, 244 U. S. 170 (at p. 172).

5. This case is brought under the Federal Employers' Liability Act and is governed by that act and by the principles of the common law as applied in the Courts of the United States. *Missouri Pacific R. R. Co. vs. Aeby*, 275 U. S. p. 426 (at p. 429); *Toledo, St. Louis & Western R. Co. vs. Allen*, 276 U. S., p. 165 (at p. 168).

6. This Court will examine the record and if found as a matter of law that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of death, the judgment of the State Court will be reversed. *Chicago, M. & St. P. R. Co. vs. Coogan*, 271 U. S., p. 472 (at p. 474), and cases cited in that

opinion: *Gulf, M. & N. R. Co. vs. Wells,* 275 U. S., p. 455.

7. Not only did the respondent fail to fix negligence upon petitioner, but the evidence affirmatively demonstrated that it had been guilty of no negligence. Hence, petitioner was entitled to a judgment of nonsuit, and at the close of the case to a directed verdict.

8. Where there is but a mere *scintilla* of evidence, the State Court, in actions brought under the Federal Employers' Liability Act, is required to follow the rule established in the Federal Courts and order a nonsuit, or direct a verdict for defendant.

Baltimore & Ohio R. Co. vs. Groeger, 266 U. S. p. 521;

Gulf, M. & N. R. Co. vs. Wells, 275 U. S. p. 455;

Toledo, St. Louis & Western R. Co. vs. Allen, 276 U. S. p. 165;

Western & Atlantic R. R. Co. vs. Hughes, Admx., decided by this Court February 18, 1929, 73 U. S. Law Ed., Advance Opinions, March 1, 1929, page 268.

Point II.

At the Time of the Accident Decedent was not Engaged in Interstate Commerce.

Whether in sweeping the "bin floor" decedent was engaged in interstate commerce is immaterial. As we have shown under Point I (pages 13, 15 and 16 of this brief), his work did not require him to uncover bin 81 or enter it; on the contrary, by the rule of the floor

and by express order, he was forbidden to do so. In addition, he had been repeatedly warned of the poisonous nature of the gas. That he did remove the covers, lower the droplight into the bin and enter it is the only possible conclusion from the evidence, for neither of the other employees on that floor did so. The fact that the cover of a spout hole and of the manhole had been removed and that a droplight had been lowered into the bin through the spout hole renders any theory of the accidental removal of these covers impossible of belief.

All of these facts and circumstances show conclusively that decedent had abandoned his employment in interstate commerce, had departed from the duties required of him, and had voluntarily and unnecessarily entered into a place of danger where his duty did not call him and from which his orders required him to keep away.

If it be suggested that he entered the bin for the purpose of removing the little bag of weevil, respondent's case is not aided, for there was no necessity whatever to remove this bag from the bin.

In *Erie R. R. Co. vs. Welsh,* 242 U. S. 303, this Court said (page 306):

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois C. R. R. Co. v. Behrens,* 233 U. S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C 163, 10 N. C. C. 153."

To the same effect is *Minneapolis & St. Louis R. R. Co. vs. Winters,* 242 U. S. 353.

In *Krysiak vs. Penn. R. R. Co.,* 270 Fed. 758 (C. C. A. Third Circuit), plaintiff's intestate had been employed in interstate commerce during the day and in leaving his place of employment to go home chose a dangerous way instead of the safe way provided by his employers. While using that way he was injured.

The Court said (page 760):

> "At that moment, we think, Krysiak ended his employment and lost the status of an employe in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

In *Harbor vs. Jenkins Rubber Co.,* 72 N. J. Law 171, plaintiff was returning to his place of work after the noon recess. He entered the premises at a proper place and was proceeding along a proper pathway when his attention was called to something glittering and he departed from that pathway for a distance of about fifty (50) feet to pick up this object. While off the pathway he was injured. Speaking of this deviation, the Court said (at page 174):

> "He was therefore neither working for the defendant company at the time nor proceeding to the place where he was to work with the intention of resuming work. When he deviated from the path, the use of which it might possibly be considered he was invited to make, he lost the protection of such implied invitation and became either a trespasser, or, at the most,

> a mere licensee, to whom the defendant company owed no duty except to abstain from willful injury."

The judgment of nonsuit was therefore affirmed.

In *Harris vs. U. S. S. Co.*, 75 N. J. Law 861, plaintiff decedent, a longshoreman, was assisting in unloading a vessel. While thus employed, it became necessary for him to have a shovel and he called to a coemployee, whose duty it was to supply tools for the longshoremen, to provide him with a shovel. Without waiting for the shovel to be brought, decedent left his place of work to procure a shovel for himself and while doing so fell into a coal hole and was killed. The Court said (at page 864):

> "When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant was in the act of providing, he became either a trespasser, or, at the most, a mere licensee, to whom the defendant owed no duty except to abstain from willful injury, unless his action was justified by a custom of which the defendant knew or ought to have known."

There being no proof of such a custom, a judgment in favor of the plaintiff was reversed.

The burden is on respondent to prove that decedent was engaged in interstate commerce at the time of the accident. The record discloses nothing but speculation and conjecture with respect to what he was doing at that time.

Tested by the rule laid down in the foregoing cases, at the time of the accident decedent was not engaged in interstate commerce, or in any duty pertaining to his employment, and petitioner was not liable for the injuries sustained.

Point III.

Decedent's Injuries and Death Were Due to His Own Negligence.

For more than 3½ days during the experiment and after its completion decedent worked on the bin floor in entire safety. Had he not, outside of his duties, and in violation of his orders, uncovered the bin and attempted to enter it the accident would not have happened.

In *Davis vs. Kennedy*, 266 U. S. 147, this Court held that no recovery could be had under the Federal Employers' Liability Act for the death of an employee of the Railroad when his death was caused by his disobedience of orders.

To the same effect see *Unadilla Valley Ry. Co. vs. Caldine, Adm'r*, decided by this Court December 10th, 1928, reported in Law Edition December 15th, 1928, page 102.

In *Mehl vs. Glucose Co.*, 83 N. J. Law, page 630, the Court said (at page 631):

> "When an employer forbids his employee to do a certain act in connection with the machine on which he is working, and the employee, while violating such prohibition, and as a result there-

from receives an injury, the employer is not liable. *Card v. Wilkins,* 32 Vroom 296."

We respectfully submit that, for the reason stated, the judgment should be reversed.

ALBERT C. WALL,
JOHN A. HARTPENCE,
Counsel for Petitioner.

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CHARLES ELMORE CROPL
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 73

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ANTONIA AMBROSE, Administratrix of the Estate of John Ambrose, deceased,
Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI.

ALEXANDER SIMPSON,
Counsel for Respondent.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1928.

No. 863.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
ANTONIA AMBROSE, Administratrix of the Estate of JOHN AMBROSE, SR., deceased,
Respondent.

BRIEF OF RESPONDENT.

Statement of Facts.

This is a reply to an application for a certiorari to review the judgment obtained by the respondent in the Hudson County Circuit Court of New Jersey. The judgment has been passed upon and affirmed by the Court of Errors and Appeals. The facts are:

John Ambrose on the 16th day of July, 1927, was a general utility man on the floor of the New York Central Railroad grain elevator at Weehawken, New Jersey, used for interstate trans-ship-

ment of grain. He died on Saturday, the Tuesday preceding which cyanide gas had been put in one of the grain bins in the elevator for the purpose of experiment. (Record pages for these facts are hereafter given.) He was last seen at 9 o'clock Saturday morning when he was sweeping the floor. The covers of the bin, the opening of which was on the floor he was working, were not sealed, at least as appears in the photographs in the record. A noise of a falling body was heard and he was found at the bottom of the bin. Death by cyanide poisoning was the physician's testimony. The fact of the presence of gas had not been communicated to him by his superintendent nor had he been warned of the danger of the gas. The only warning, if any was given, was that he was told to keep away from the bin, that is, not to go into the bin.

The statement of facts in the brief of the petitioner, page 5, bottom of page says:

> "Shanahan had no authority to permit the experiment (Record, page 35, line 25)."

The record page 24, line 19, is as follows:

> "Paul S. Shanahan, sworn for the plaintiff.
> Q. What is your occupation? A. Superintendent on grain elevator.
> Q. You were in complete charge of it? A. Yes, sir; of the elevator."

This shows that he had complete charge of the building, permitted the use of the elevator, without notice to decedent then at work, at the place where he had hired himself out as a work-

man in the grain elevator, to be changed into a place where dangerous chemical experiments were being conducted.

POINT I.

The proof showed that the gas used was cyanide, a poisonous gas. (Testimony of Dr Sachs, Record, page 41, line 35.) The gas was being used in experiments to exterminate vermin in wheat. (Record pages 24, 25.) The gas being used was cyanide. (Record, page 25, line 35.) The gas was put in the wheat, which was in bags. (Record page 26, line 12.)

The manager of the grain elevator floor, Dillworth, said that when he looked over the bin into which the man now deceased had fallen, he smelled gas. (Record, page 67, line 30.) It is, of course, admitted that negligence must be shown under the Federal Employers Liability Act but there was evidence from which the jury could find negligence; if there was proof that the master had caused cyanide gas to be in the grain warehouse, no matter what part of the grain warehouse, if it could escape and injure an employee, this made the warehouse an unsafe place in which the servant worked.

There is no proof that the so-called covers were air-tight and there was evidence in the case from which the jury could find that they were not. (See photographs offered in evidence.) Ambrose's work was that of general utility man on the floor; sweeper of floor; attending to the bins; and the

jury could very well find that he was within the scope of his employment while sweeping the floor during work that it might be necessary to adjust the covers of the bin and in so doing, there was ample evidence to justify an inference that he had been overcome by this gas and fallen down the bin.

It is true there was no eye witness to the accident, but there was circumstantial evidence. The poisonous gas in the warehouse; death of Ambrose by gas poison; cases found in Corpus Juris title, Death Volume 17, P. 1308-9-10 are authority for the proposition that there was evidence enough to go to the jury.

The case cited in brief of petitioner, Chicago, Milwaukee and St. Paul v. Coogan 271 U. S. 472 is distinguishable. In the Coogan case, there was no direct evidence that decedent's foot was caught in a pipe; all the evidence there was that the body of deceased was found near the west end of the second car from the caboose and he was lying parallel with the track. There were indications that he had been between the rails of the track but no evidence as to the proximate cause of death. In our case we have the presence of cyanide gas and death by cyanide poisoning. There is no speculation necessary.

The evidence in this case is not direct but circumstantial. The gas; the death by gas; the finding of the body; the condition of the bin; the admitted presence of a poisonous gas. There could

be no more evidence except the testimony of the man killed, as he was alone at the time of the accident. In short, the negligence relied on is that the decedent was killed by this colorless, odorless and deadly gas; this was a demonstration and the master failed to use reasonable care to provide a safe place for the servant.

The New Jersey Supreme Court said in Manziano vs. P. S., 92 N. J. L. 326:

> "In such an environment the natural presumption is that the deceased met death while engaged in his occupation. There was no evidence that between four and six o'clock in the morning he voluntarily entered the trench for any purpose incompatible with his duty; nor was there evidence that he was *non compos* or abnormal and unable to appreciate and realize the necessary incidents of the danger which surrounded him, and to guard against the manifest and inherent perils of which he was enjoined to warn the public. In the absence of proof to that effect, the theory of suicide must be eliminated from the case, for the rule seems to be settled that where a person is found dead, the presumptions are that his death was natural or accidental, unless the evidence shows him to have been insane; that suicide will not be presumed, and that the fact of death in an unknown manner creates no such presumption (Germain vs. Brooklyn Life Insurance Co., 26 Hun, 604; 29 Cyc., 235, and cases cited).
>
> Illustrations of the application in this jurisdiction, of deductive reasoning from circumstantial testimony, are presented in DeFazio vs. Goldschmidt Company, 87 N. J. L., 317; Bryant vs. Fissell, 84 *Id.*, 72; Muzik vs. Erie Railroad Co., 85 *Id.*, 129.

> In two of the cases cited there was proof only of the death and of the dangerous environment of the deceased, which furnished presumptive or circumstantial testimony of the manner of death, by a logical process of rational induction, based upon human experience, from which the reasonable inference of the existence of the statutory requirements was deducible, *i. e.*, that death arose out of and in the course of the employment."

Also see the case of U. S. Fidelity & Guarantee Co., vs. Ind. Comm., Colo., 230 Pac., 634. (1924.) See also Western and Atlantic R. R. Co. v. Nora E. Hughes, 73 Lawyers Edition, U. S. Supreme Court, #7, March 1st, 1929, Advanced Sheets, page 268, which holds "Creditability of witness and weight of facts were obviously a matter for the jury."

The witness, Fitzpatrick, who was on the floor doing the same kind of work had lost his sense of smell (Record, page 22). Decedent swept the floor and moved the trolleys and generally helped around. (Record p. 22, lines 20-30.) The witness, Fitzpatrick, does not testify the covers were on the bin (Record page 24). The witness, Fitzpatrick, did not hear Mr. Dillworth say anything to decedent about keeping away from the bin. (Record p. 23, line 18.)

The use of the elevator for the purpose of experimenting with this deadly gas was with the knowledge and consent of the defendant. (Record p. 25.) Singer Mfg. Co. v. Rahn, 132 U. S., 518; New Orleans R. R. v. Henning, 15 Wall, 649. The experimenting consisted in having an apparatus

distribute the cyanide through the grain and a certain specific flow and was completed on Tuesday preceding the Saturday of the accident.

The gas was to stay in the bin 72 hours. (Record page 26, line 15). The bin was not sealed at the top in which the gas was being used. (Record p. 27, line 16.) The gas was formed by the air and powder coming in contact. (Record p. 27, lines 30-40.)

There is no proof that the dead man went into the bin. In adjusting the covers, he could have been so overcome by gas as to fall into the bin. No instructions were given by Shanahan to the men as to the danger of the gas. He contented himself with telling Mr. Dillworth, the floor foreman.

On Tuesday, both Dillworth and Ambrose took the covers off and looked into the bin, evidently under Dillworth's orders, who was the foreman. These men were not told that the gas in the bin was fatal. (Record p. 35, line 10.) Petitioner did consent to the experiment through the man in charge of the elevator.

> Singer Co. v. Rahn, 132 U. S., p. 518;
> New Orleans R. R. v. Henning, 15 Wall, 649.

The only testimony to this effect is the self-serving testimony of Shanahan, (Record p. 35, line 23) but the fact remains that Shanahan was

the superintendent and in complete charge of the grain elevator. On page 24 of the Record, he is asked:

> Q. What is your occupation? 'A. Superintendent on grain elevator.
> Q. You were in complete charge of it? A. Yes, sir; of the elevator.

So, it is idle to say he did not have the authority to allow the presence of gas in the structure. Petitioner indicates, but does not state, that the cause of decedent's death was his own negligence. To support this argument they would have to prove that decedent put the gas in the warehouse because it was the presence of the gas that was the negligence.

POINT II.

Decedent was in a grain warehouse used by the defendant as a common carrier by railroad as means of shipping grain received from without New Jersey and shipping it outside of New Jersey by boats to New York. It was therefore an instrument of Interstate Commerce. See the following cases:

> Illanardo v. Erie, 103 N. J. L. 4; affirmed in 103 N. J. L. 698;
> Grybowski v. Erie, 89 N. J. L. 361;
> Lemke v. Farmers Grain Co., 258 U. S. page 50.

The jury, from the evidence, could find that the man, when killed, was sweeping the floor of the

grain warehouse, where it might be necessary for him to adjust the cover of the bin, or where gas was escaping under the cover and he was trying to prevent it, and whether he had removed the cover, were all inferences that the jury could have drawn. It is not a question of a servant waiting to be directed as in the case of Erie R. R. v. Welch, 242 U. S. 303. Here he was actually at work in the warehouse when he was killed. He had not ended his employment because he was killed early in the morning. There were weighers on the floor above who sounded a bell for the decedent to notify them whether grain was to go into the chutes. The defendant accounted for one weigher but not for the other, and it was not within the realm of speculation for the jury to say that there was a sounding of bells for the man, now dead, to get the chute ready, for two of the covers were off after the accident. There were four holes to be covered. You have to take the spout hole cover off to put the spout on. (Record page 50, line 30.)

One of the weighers, John T. Brewer, describes the course of business. (Record page 52). Any one of the weighers would call the decedent. (Record, page 67.) Dillworth was affected by gas. (Record, page 68.)

The witness, Dillworth, who was the foreman of decedent had not seen him after 9 o'clock in the morning. (Record, page 68, line 33.) He was killed between quarter of ten and ten o'clock.

POINT III.

Contributory negligence is not a defense in actions under the Federal Employers Liability Act. It may reduce the damages, and in this case it probably did, for the recovery was very small, $6,-300.00. That question was submitted to the jury by the charge of the Court. (Record p. 77, lines 20-37.)

In the Krysiak v. P. R. R. case, 270 Federal, 758, cited by petitioner, the man injured had finished his work and lost the status of an employee in Interstate Commerce. The decedent here was actively at work in his place of employment when he was killed. To say that he voluntarily removed the covers for a purpose other than that of his employment is to go into the realm of speculation.

Risk.

In the brief of the petitioner, no mention is made of risk, but it is plain that risk of death by poison by an invisible gas which has no odor and is only detected by its affects, which are serious poisoning or death, is not one of the risks intended to the business of shipping grain on a grain elevator. The only risks are those incidental to the moving of grain. It was not an obvious risk because the decedent was an ordinary laboring man and had no means of knowing what the gas was and what it would do. The mere fact that he had been told to keep away from the bin, if he was

told, and that the creditability of the witness who so testified, was for the jury, as the only person to contradict him was dead and he had not apprised him of the danger. See Clark v. Public Service Co., 86 N. J. L. 144 Pt. 4 of syllabus. is not conclusive

Exhibit P. 2 shows the inside of the bin looking down. Exhibit P. 3 shows the floor on which the decedent was working. These were offered in evidence and could have been taken by the jury to show that the holes were not air-tight. These were shown to the jury and would warrant the jury to find it as a fact that the holes and the covers showed that the covers did not make it impossible for gas to escape.

The Hughes case found in 73 U. S. Law Ed. #7 Advanced Sheets, March 1st, 1929, page 268, cited by the petitioner, is relied on by the respondent. It cannot be argued that the death of Ambrose was due to his failure to obey orders as in the case of Unandilla Rwy. v. Caldine, Advanced Sheets, December 15th, 1928, page 102.

It is respectfully submitted that the petition be dismissed.

ALEXANDER SIMPSON,
Of Counsel with Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 73.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

ON WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 73.

NEW YORK CENTRAL RAILROAD COMPANY, *Petitioner,* vs. ANTONIO AMBROSE, Administratrix of the Estate of John Ambrose, deceased, *Respondent.*	On Writ of Certiorari.

BRIEF FOR RESPONDENT.

It is respectfully submitted, in beginning this argument, that the questions in dispute were not Court questions but were jury questions. While the jury might have drawn the conclusions claimed by the appellant, yet they were not compelled to draw them, and this argument is respectfully submitted on the theory that the jury could have drawn other conclusions on the testimony, which are the conclusions making for liability.

POINT 1.

Negligence established against petitioner.

The testimony adduced by the respondent showed that the decedent was employed by the petitioner as a gen-

eral utility man in its grain elevator at Weehawken, New Jersey, which was used for interstate tran-shipment of grain. The decedent had been employed at this elevator for a period of thirty years and his general work consisted of sweeping up the floor of the elevator, but besides that he helped to set the trolleys which are chutes for putting the grain in the bins; that there were times when he would have to go down the bins and sweep them out when the grain got stuck therein (R., p. 5).

Prior to the accident, there was a company which was experimenting with cyanide gas in order to find a remedy to kill the boll weevil which was found in the grain. The petitioner in its brief (R., p. 11) states that Mr. Shanahan, its superintendent, had no authority to permit the experiment. But, the record shows that Mr. Shanahan testified that he was in complete charge of the elevator (R., p. 21). The petitioner did consent to the experiment through the man in charge of the elevator.

> "A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved of or forbade it."
>
> Singer Co. vs. Rahn, 132 U. S., 518.

The only testimony to this effect is the self-serving testimony of the superintendent (R., p. 31), but the fact remains that Shanahan was the superintendent and in complete charge of the grain elevator. On page 21 of the record, he was asked:

> "Q. What is your occupation? A. Superintendent of grain elevator.
>
> "Q. You was in complete charge of it? A. Yes, sir; of the elevator."

Yet, the petitioner did not put anyone on the stand to testify that no representative of the cyanide people had made application to the New York Central Railroad for a letter of authorization to conduct the test. It may have been that a letter of authorization had been granted to the experimenting people by the petitioner. It was a jury question, under all of these circumstances, as to whether or not the petitioner, through its superintendent, who was in complete charge of the grain warehouse, had authority to permit the experiment.

It is, therefore, idle to say that he did not have authority to allow the presence of the gas in the structure. The gas used in the experiment was very dangerous and meant instantaneous death, and the petitioner knew this (R., p. 29). Notwithstanding that this was very dangerous, yet no one in the elevator was provided with gas masks, nor were the tops of the bins sealed so that the gas could not get out (R., p. 24).

This poisonous gas resulted from a powder, that was put or deposited in the grain, coming in contact with the air and moisture contained in the grain (R., p. 24). On the morning of the accident, the decedent was sweeping the floor of the bin and about a half hour later his foreman heard a noise as if something was hitting and he looked down into the bin around which the decedent had been sweeping and saw his body lying at the bottom of the bin (R., p. 7).

The witness, Fitzpatrick, testified that he did not know how many covers bin #81, wherein the decedent's body was found, had or whether the covers were on or not on the morning of the accident. These covers are on the level with the floor (R., p. 21). This witness worked on the same floor with the decedent at practically the same work (R., p. 19).

There is no proof that the so-called covers were air tight and there was evidence in the case from which

the jury could find that they were not. See photo offered in evidence (R., p. 79).

When the doctor from the North Hudson Hospital arrived at the elevator, in response to an ambulance call, he went near the bin but the odor of the gas was so strong that he had to get away (R., p. 36). Then a West New York fireman came, Raymond Phelman, who donned a gas mask and with a rope around his body, he went into the bin where the deceased was lying and he got down about ten rungs when he signalled to be hoisted and he was pulled up because he felt headaches and dizzy and had to go to the window for five minutes to get air (R., pp. 48-49).

When they got the body of the deceased out of the bin, the doctor gave the cause of death as cyanide poisoning (R., p. 37). He also stated that the fireman had the same initial symptoms that one finds from cyanide gas poisoning (R., p. 37).

The petitioner, without warning the decedent in a proper manner, caused to be put in a bin around which the decedent was working and the top of which opened on the floor above which he was working, cyanide gas, an invisible poison, which could not be detected by sight or smell. This gas was in the bin for four days and in some way escaped to the floor on which the decedent was working and while he was sweeping the floor, either in adjusting the cover of the bin, which was not air tight, or in looking for the bag in the bin, or upon orders from upstairs to get the chute ready, was poisoned and fell into the bin.

Clearly, it was for the jury to say whether this conduct of the petitioner was negligent. You can hardly call such a death trap a safe place in which to work.

This Court in the case of Northern P. R. Co. vs. Peterson, 162 U. S., 346, said:

> "The master owes the duty to his servant to provide him a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged."

See also the following cases:

> U. S. vs. Ind. Com. Colo., 230 Pac., 634;
> McCabe Construction Co. vs. Wilson, 209 U. S., 275.

The jury could have found from the testimony that no warning whatever was given to decedent except, if the testimony is believed, to tell him to keep away from the bin as much as possible (R., p. 14), although the witness Fitzpatrick, who was on the floor and doing the same kind of work as the decedent, testified that he did not hear the foreman say anything to the decedent to keep away from the bin (R., p. 20), which the decedent could not do for four days while he was working on the floor. No details whatever were given him, neither was he told that cyanide gas was being used nor in any way put in a position to protect himself.

In the case of Clark vs. Public Service Electric Co., 86 N. J. L., 145, Chancellor Walker speaking for the Court of Errors and Appeals said:

> "The rule seems to be as stated in 38 Cyc., 1570, that a verdict will not be directed where the only person who could have contradicted the witness is dead."

It is, of course, admitted that negligence must be shown under the Federal Employers Liability Act, but there was evidence from which the jury could find negligence in the instant case. The jury could have found that the bin floor on which the decedent worked was 300

feet long and 130 feet wide; that bells were sounded from upstairs to get the chutes ready; that decedent was working in response to a bell; that there was cyanide gas in the grain warehouse and no matter what part of the grain warehouse, if it could escape and injure an employee, this made the warehouse an unsafe place in which the servant worked. The jury could very well find that he was within the scope of his employment while sweeping the floor that, during his work, it might be necessary to adjust the covers of the bin and in so doing, there was ample evidence to justify an inference that he had been overcome by this gas and fallen down the bin.

In the case of McLaughlin vs. Joseph Horne Co., 206 Federal, Circuit Court Judge McPherson, speaking for the Third Circuit on page 249, said:

> "And a conflict may exist among the witnesses, not only where facts are directly disputed, but also where it is uncertain what inferences should be drawn from the facts after these have been established. Inferences of fact are themselves facts, and ordinarily the jury must draw them and not the judge. Especially is this true when the inquiry has to do with the standard of ordinary care, care according to the circumstances, where no previously defined standard exists, and where our system of jurisprudence commits to the judgment of a jury the duty of determining the shifting rule for the particular case, and citing the cases of:
>
> Grand Trunk Ry. Co. vs. Ives, 144 U. S., 417;
> Texas R. R. Co. vs. Harvey, 228 U. S., 319;
> Slentz vs. Western Co., 180 Federal, 389."

See also:

> Western & Atlantic R. R. Co. vs. Hughes, Advanced Sheets of March 1st, 1929, page 268.

The evidence in this case did not leave the negligence of the petitioner in the realm of speculation, as the jury could have inferred negligence from all the circumstances of the case. The instant case was not like the cases cited by the petitioner in its brief.

In the case of McCombe vs. Public Service, 95 New Jersey Law, 187, there was nothing but the circumstances of the body of Saunders under the car.

In the Adriance case, 95 New Jersey Law, 185, nobody knows or could surmise from the evidence what happened.

In the case of Price vs. New York Central Railroad, 92 Law, 429, the citation being taken from the first trial of the Price case, there was no proof of any fact exclusive of presumption.

Nor is the instant case like that of Chicago Railroad Co. vs. Coogan, 271 U. S., 472, where the Supreme Court said:

> "A judgment for plaintiff in an action to recover damages for wrongful death cannot be sustained where the record leaves the question of defendant's negligence in the realm of speculation and conjecture."

The evidence in the instant case is not direct but circumstantial—the admitted presence of a poisonous gas; death by gas; finding of the body; condition of the bin with the tops unsealed; decedent working on the bin floor doing his accustomed work, etc. There could be no more evidence except the testimony of the man killed as he was alone at the time of the accident.

In the case of Austin vs. P. R. R. Co., 82 New Jersey Law, 416, the New Jersey Court of Errors and Appeals said:

> "All that is required is that the circumstances be so strong that a jury may properly, on the grounds

> of probability rather than of certainty, exclude an inference favorable to the defendant."

It is not necessary to have actual eye witnesses to allow the case to go to a jury, as the petitioner in its brief argues, but it is sufficient if there is enough of circumstantial evidence to connect the petitioner's negligence with the decedent's death.

In the case of State vs. Elliot, 94 New Jersey Law, 76, which was a case where the deceased was struck by a fast moving, high power, Packard car and the only identification of the defendant was made by witnesses who described a car similar to the defendant, which car had struck a human body and which "threw it in the air" and the left mud guard of the car was bent. The Supreme Court held that the jury might reasonably infer that it was the defendant's car which was the instrumentality which caused the homicide. The Court in this case on page 79 remarked:

> "The identification of the car and its driver, under the circumstances, was almost necessarily circumstantial, but the rule is indubitable that such testimony may present a case sufficiently cogent and connected to go to the jury and afford the basis for a verdict."

As long as the evidence adduced at the trial was sufficient for the jury to infer negligence on the part of the petitioner that is sufficient to sustain a verdict as it is not incumbent upon the respondent to demonstrate by actual eye witnesses as to how the accident happened.

This Court in the case of Myers vs. Pittsburgh Coal Co., 233 U. S., 184, said:

> "A verdict in favor of plaintiff in an action for death should not be set aside by an Appellate Court

for the lack of evidence to support it unless the testimony was such that no recovery could be had upon the facts shown in any view which could properly be taken of them."

The instant case is not like the case of Erie R. R. vs. Welch, 242 U. S., 303, where the servant was waiting to be directed, for the deceased in the case subjudice was actually at work in the warehouse when he met his death. He had not ended his employment because he was killed early in the morning.

There were weighers on the floor above who sounded a bell for the decedent to notify them whether the grain was to go into the chutes. The petitioner at the trial accounted for one weigher, but not for the other and it was not within the realm of speculation for the jury to find that there was a sounding of bells for the deceased to get the chute ready, for two of the covers were found off after the accident and that the deceased met his death while answering the call from one of the weighers.

There were four holes to be covered and it is necessary to take the spout hole cover off to put the spout on (R., p. 44). The jury could have found from the evidence that any one of the weighers could call the decedent to get the chutes ready (R., p. 44).

POINT 2.

Decedent engaged in Interstate Commerce.

The decedent was working in the general work of sweeping, cleaning the floor, adjusting the bins, etc., in a grain warehouse used by the petitioner as a common carrier of railroad as a means of shipping grain received from without New Jersey and shipping it outside of New Jersey. It was, therefore, an instrumentality of interstate commerce (R., p. 55).

"The buying of grain within a State for shipment to markets in other states constitutes interstate commerce, if followed by shipments into other States."

Shafer vs. Farmer's Grain Co., 268 U. S., 189.

"The business of buying grain in North Dakota, practically all of which is intended for shipment to, and sale at, terminal markets in other states, conformably to the usual and general course of business in the grain trade, is interstate commerce."

Lemke vs. Farmer's Grain Co., 258 U. S., 50.

"A person who is employed by a railroad company in maintaining the effectiveness of a part of the railroad's plant, which is used in both interstate and intrastate commerce, is entitled to maintain an action under the Federal Employers' Liability Act when injured while engagd in such employment."

Illanardo vs. Erie R. R., 103 New Jersey Law, 4; affirmed by Court of Errors and Appeals in 103 New Jersey Law, 698.

See also:

Grybowski vs. Erie R. R., 89 New Jersey Law, 361.

POINT 3.

Decedent's death not due to his own negligence.

The jury could find that decedent's work was that of general utility man on the floor—sweeper of the floor, attending the bin, etc.; and it was for the jury and not

for the Court to say how the gas escaped. If it escaped to the floor on which he was working and he attempted to adjust the covers and was poisoned and fell, or if he got a bell from above, and in the usual course of his work, went to the bin, or if someone other than the decedent improperly lifted the cover to see where the bag was that was stuck in the chute and gas escaped and he went towards the hole to see if the condition could be remedied to protect himself and other workers on the floor, all these things would be in the line of his general employment and it was a jury question as to whether he was outside his duties when he was poisoned.

There is no proof that the dead man went into the bin. In adjusting covers, he could have been so overcome by gas as to fall into the bin, as the gas was to stay in the bin seventy-two hours (R., p. 23), and the bin was not sealed at the top in which the gas was being used (R., p. 24).

The New Jersey Supreme Court in the case of Manziano vs. P. S., 92 L., 326, said:

> "In such an environment the natural presumption is that the deceased met death while engaged in his occupation. There was no evidence that between four and six o'clock in the morning he voluntarily entered the trench for any purpose incompatible with his duty; nor was there evidence that he was non compos or abnormal and unable to appreciate and realize the necessary incidents of the danger which surrounded him, and to guard against the manifest and inherent perils of which he was enjoined to warn the public. In the absence of proof to that effect, the theory of suicide must be eliminated from the case, for the rule seems to be settled that where a person is found dead, the presumptions are that his death was natural or accidental, unless the evidence

shows him to have been insane; that suicide will not be presumed, and that the fact of death in an unknown manner creates no such presumption (Germain vs. Brooklyn Life Insurance Co., 26 Hun, 604; 29 Cyc., 235, and cases cited).

Illustrations of the application in this jurisdiction, of deductive reasoning from circumstantial testimony, are presented in DeFazio vs. Goldschmidt Company, 87 N. J. L., 317; Bryant vs. Fissell, 84 Id., 72; Muzik vs. Erie Railroad Co., 85 Id., 129.

In two of the cases cited there was proof only of the death and of the dangerous environment of the deceased, which furnished presumptive or circumstantial testimony of the manner of death, by a logical process of rational induction, based upon human experience, from which the reasonable inference of the existence of the statutory requirements was deducible, i. e., that death arose out of and in the course of the employment."

The petitioner in its argument assumes that decedent had no right to be where he was when he was poisoned, but he was working on the floor where he was put to work and doing the things which he ought to do, viz., look after the floor and bins that opened on the floor, and it was a jury question as to what he was doing when he was poisoned and whether it was within the scope of his employment.

In the case of Phoenix Mutual Insurance Co. vs. Doster, 106 U. S., 31, the Court said:

"Where a case fairly depends upon the effect or weight of testimony, it is for the consideration and determination of the jury, and it should never be withdrawn from them, unless the testimony be of such conclusive character as to compel the court, in

> the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it."

It cannot be argued that the death of the decedent was due to his failure to obey orders as in the case of Unadilla Valley R. R. Co. vs. Caldine, decided by this Court, December 10th, 1928, and reported in Law Edition, December 15th, 1928, page 102, because the deceased in our case was actively at work in his place of employment doing the things that he was told to do when he was killed. To say that he voluntarily removed the covers for a purpose other than that of his employment is to go into the realm of speculation.

Here the respondent was dead and therefore was presumed to be free from negligence. This presumption, of course, is rebuttable, and it raised a factual question for the jury. See case of Erie R. R. vs. Lindquist, 27 Fed. (2nd) where Circuit Court Judge Wooley, speaking for the Third Circuit, on page 100, said:

> "In an action against railroad for death of fireman, the latter, being dead, is presumed free from negligence, though presumption is rebuttable."

To take the case away from the jury on the ground that it was established that the decedent was negligent, that his negligence was the sole cause of his death, would be to take away from the jury the right to consider this presumption.

The respondent respectfully contends that there was no evidence to support this conclusion that decedent was negligent and that it would be mere speculation, but if that assumption of the respondent is deemed untenable and it is found that there was evidence allowing the conclusion, still it was for the jury to weigh this evidence against the presumption aforesaid and determine whether that presumption had been rebutted.

All of the questions involved in this case are jury questions and not for the Court, and it is respectfully submitted that the matters were properly left for the jury to decide.

It is respectfully submitted that the judgment below should be affirmed.

ALEX. SIMPSON,
Counsel for Respondent.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1929.

New York Central Railroad Company, Petitioner, *vs.* Antonia Ambrose, as Administratrix of the Estate of John Ambrose, Deceased.	On Writ of Certiorari to the Circuit Court of Hudson County, State of New Jersey.

[February 24, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action under the Federal Employers' Liability Act for the death of John Ambrose, as the result of an alleged negligent failure of the railroad company to furnish a safe place to work.

Ambrose had been employed for many years in a grain elevator belonging to the company and used to facilitate the shipment of grain in interstate commerce. He worked on the "bin floor," which lies above a large number of grain bins, and with each of which it is connected by a circular opening, seventeen inches in diameter, furnished with a spout to carry the grain from the floor into the bin, and by a rectangular manhole, twenty by sixteen and three-quarter inches in size. These openings, when not in use, are closed with metal covers resting on flanges and sunk to a level with the floor.

Ambrose' duties were to sweep the floor, help set the spouts, and generally to do such floor work as his foreman might direct. Sometimes grain became clogged so that it would not run out from the bin; in which event one man would descend into the bin to clean it out, while another lowered and held a light in such position as to assist the former in the performance of his work. This work was rarely done and only upon an order from the foreman or superintendent.

A short time prior to the accident, with the consent of the superintendent, a representative of a company not connected with the railroad was permitted to make an experiment in one of the bins for

the extermination of [redacted] weevil and other insects, which sometimes got into the grain. This experiment was conducted by mingling with the grain, as it moved through the bin, a powder, which generated a poisonous gas supposed to destroy the insects. In conducting the experiment, forty small bags containing weevil were dropped into the grain. After the experiment, one of the bags which had failed to come through was found lodged within the bin, but it was not intended or thought necessary to remove it. Ambrose was present when the foreman lowered a droplight into the bin and disclosed the bag, and was told by the foreman to keep away from the bin as much as possible, not to "hang around" it, that the gas was poisonous.

The following morning the only men at work on the floor were the foreman, Ambrose, and another employee. Both covers were in place, and Ambrose was engaged in sweeping the floor. The foreman went to another part of the premises, but, about twenty minutes later, hearing a noise "like something hitting," returned to the floor. He then found the covers of both openings off, and an electric droplight hanging through the spouthole into the bin. Looking down he saw Ambrose' body lying at the bottom. There is no evidence to show how the covers were removed or the circumstances under which Ambrose entered the bin and so came to his death.

The case was tried before a state circuit court, and the jury returned a verdict for the respondent, upon which there was a final judgment. Upon appeal to the New Jersey Court of Errors and Appeals, the judges were equally divided; and the judgment, because of that division, was affirmed.

We are of opinion that there must be a reversal because the evidence fails to establish negligence on the part of the railroad company. That the bin was a dangerous place does not admit of doubt. It contained a poisonous gas of the most deadly character. But of this Ambrose was informed. Not only was there no duty on his part to enter the bin, unless ordered to do so, but he had been specifically told of its dangerous character and warned to keep away as much as possible.

It is said the jury could have found that a signal had been given to get the spouts ready, to which Ambrose responded; or that Ambrose found it necessary, within the scope of his employment while sweeping the floor, to adjust the covers of the openings, and

in so doing was overcome by the gas and fell into the bin. But these are mere surmises, not legitimate inferences deducible from the proved facts. Considering the limited size of the openings, it is beyond reasonable belief that Ambrose could have *fallen* through either of them. In the absence of positive evidence to the contrary, the more rational conclusion is that he passed through the manhole by conscious and deliberate effort; and to that conclusion, the fact that the covers of both openings were off, with a droplight hanging through the smaller one, lends a noticeable degree of plausibility. True, in the face of the warning that the bin was dangerous and to keep away from it as much as possible, it is hard to find any good reason for such voluntary entrance on his part; but it is more difficult to account for the tragedy in any other way.

In any view of the matter, the respondent (plaintiff), upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478, and cases cited.

The utmost that can be said is, that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough. See *Patton* v. *Texas and Pacific Railway Co.,* 179 U. S. 658, where, at page 663, this court said:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. . . . it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It is scarcely necessary to add that a recovery can not be predicated upon the theory that Ambrose, of his own accord, entered the bin. Whatever previously would have been the liability of the company, in virtue of the rule which requires the master to use reasonable care to furnish a safe place to work, there was no liability under that rule at the time of the accident, since, manifestly, the rule ceases to be operative whenever, and as long as, the place is closed against the servant, and he is authoritatively notified that it is unsafe and warned to avoid it. The master who furnishes the place may, of course, abandon or suspend its use, whenever he discovers that it has ceased to be safe; and a servant, so notified and warned, who ignores the notice and warning, does so at his own risk.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.